

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

Documents created before and after the commencement of the *Health Care Act 2008*

Agency	Central Adelaide Local Health Network
Ombudsman reference	2018/06640

Application for access

The applicant sought access from the agency to deceased relatives' medical records. Some of the documents in issue in relation to each of the applicant's relatives were created before, and some after, the commencement of the *Health Care Act 2008* (the **Health Care Act**).¹

Ombudsman review

The agency claimed that the medical records were exempt in full as documents the subject of secrecy provisions (clause 12(1) of Schedule 1 to the *Freedom of Information Act 1991* (the **FOI Act**), in conjunction with section 93(2) of the Health Care Act.

Clause 12(1) provides that:

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

The relevant parts of section 93 provide:

- (2) 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^[2] or SAAS—by the hospital or SAAS (as the case requires).Maximum penalty: \$10 000.
- (3) Subsection (2) does not prevent a person from—
 - (a) disclosing information as required or authorised by or under 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

¹ The *Health Care Act 2008* commenced on 10 April 2008.

² An 'incorporated hospital' means a hospital incorporated under the Health Care Act: *Health Care Act 2008*, section 3(1). The Central 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+content/sa+health+internet/about+us/our+local+health+networks> (accessed 23 July 2018).

- (iv) a substitute decision-maker for the person to whom the information relates (within the meaning of the *Advance Care Directives Act 2013*); ...
- (6) In this section—
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 the information or opinion.

Consideration

I was satisfied that the medical records consisted of personal information relating to the applicant's relatives.

Records that post-dated the commencement of the Health Care Act

With respect to the parts of the medical records that post-dated the commencement of the Health Care Act, I accepted that agency staff obtained the applicant's relatives' personal information whilst engaged in connection with the operation of the Health Care Act.

The FOI Act neither requires nor authorises the disclosure of information to any person. It provides members of the public with a right to be given access to an agency's documents *in accordance with the FOI Act*.³ Section 20(1)(a) of the FOI Act clearly empowers an agency to refuse access to an 'exempt document'. Given this, the agency could not rely on section 93(3)(a) of the Health Care Act to disclose personal information to the applicant relating to his late relatives.

In addition, as the applicant's relatives had passed away before the applicant made the application, neither sub-paragraphs (ii) nor (iv) of section 93(3)(b) were enlivened. A deceased person cannot have a guardian or a substitute decision-maker.

Given that the exceptions to the terms of section 93(2) of the Health Care Act had no application in the present case, I concluded that it would be an offence for the agency to disclose those parts of the applicant's relatives' medical records created on or after the Health Care Act commenced to any other person, including the applicant.

Records that pre-dated the commencement of the Health Care Act

I concluded, however, that information that pre-dated the commencement of the Health Care Act could not be said to have been *obtained* whilst agency staff were engaged in connection with the Health Care Act.⁴ Accordingly, I was not satisfied that the parts of the medical records that pre-dated the commencement of the Health Care Act were exempt under clause 12(1) in conjunction with section 93(2) of the Health Care Act.

I considered whether section 64(1) of the *South Australian Health Commission Act 1976 (SAHC Act)*⁵ could enliven a claim of exemption under clause 12(1), but concluded it did not. Whilst the SAHC Act included a confidentiality provision (section 64(1)), this section, along with the rest of the SAHC Act, was repealed by the Health Care Act.⁶ It ceased to have any effect on 1 July 2008.

³ *Freedom of Information Act 1991*, section 12.

⁴ *Matthews and Australian Securities and Investment Commission & Ors* [2010] AATA 649, [15] to [17]. In that case, the Tribunal considered the meaning of the word 'obtained' in the context of the former section 36(1)(a) of the *Freedom of Information Act 1982* (Cth), which was worded similarly to clause 9(1) of the *Freedom of Information Act 1991* (SA). I consider the Tribunal's findings as to the meaning of the word 'obtained' relevant to my interpretation of section 93(2) of the *Health Care Act 2008*.

⁵ Section 64(1) of the *South Australian Health Commission Act 1976* imposed a duty on various people not to divulge 'personal information relating to a patient obtained in the course of [their] employment' other than in limited circumstances.

⁶ Schedule 4, clause 33(c) of the *Health Care Act 2008*.

I went on to consider whether the parts of the medical records were otherwise exempt under the FOI Act.

I concluded that they were exempt under clause 6(1) of Schedule 1 to the FOI Act, which provides:

A document is an exempt document if it contains matter the disclosure of which would involve the unreasonable disclosure of information concerning the personal affairs of any person (living or dead).

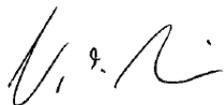
I accepted that medical records concern the personal affairs of the patients to whom they relate.

In forming the view that disclosure of those parts of the medical records that pre-dated the commencement of the Health Care Act would be unreasonable I considered various factors, including:

- the public interest in protecting personal privacy, given the sensitive nature of the information
- the circumstances in which the information was obtained⁷
- the likelihood that the applicant's relatives would not want the information about them to be released.

Determination

Having concluded that the parts of the medical records that post-dated the commencement of the Health Care Act were exempt under clause 12(1), and the parts that pre-dated the commencement of the Health Care Act were exempt under clause 6(1) of Schedule 1 to the FOI Act, I confirmed the agency's determination.



Wayne Lines
SA OMBUDSMAN

10 September 2018

⁷ Including the operation of section 64 of the *South Australian Health Commission Act 1976* at the relevant times.