T R A N S C R I P T

INTEGRITY AND OVERSIGHT COMMITTEE

Inquiry into the Operation of the *Freedom of Information Act 1982*

Melbourne – Wednesday 13 March 2024

MEMBERS

Dr Tim Read – Chair
Hon Kim Wells – Deputy Chair
Ryan Batchelor
Jade Benham
Eden Foster
Paul Mercurio
Rachel Payne
Belinda Wilson

WITNESS

Trudy Ararat, Chief Legal Officer, Peninsula Health.

The CHAIR: We are resuming the public hearing for the IOC's inquiry into the operation of the FOI [Freedom of Information] Act. We have got Ms Trudy Ararat with us. Bear with us; I have got to cover some formal matters.

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Just introducing: on my left is Deputy Chair Kim Wells. I am the Chair, Tim Read. We have Ryan Batchelor, Eden Foster and Paul Mercurio. Appearing before us is Ms Trudy Ararat, Chief Legal Officer at Peninsula Health. Thank you very much for coming in and for making your submission. Did you have any brief opening remarks, or do you want to go straight to questions?

Trudy ARARAT: I am happy just to make a couple of brief opening remarks. Thank you for the opportunity to assist the Committee with its inquiry. My name is Trudy Ararat, and I am employed by Peninsula Health as its Chief Legal Officer. The legal department at Peninsula Health is responsible for, amongst other things, managing and administering the Freedom-of-Information requests and other release-of-information requests across the organisation. Peninsula Health in the calendar year 2023 received 1317 Freedom-of-Information requests and approximately 13,000 requests for release of information outside of the FOI process. The overwhelming majority of FOI requests received by Peninsula Health are for access to medical records by the patient for their own medical records or by their legal representative or another statutory body. On rare occasions we receive requests for business records, such as elective surgery waiting lists, but the majority of requests are for individual health records. Eighty-two per cent of the time we release the records in full. We have very, very low rates of denial of access to records in full, and in the remaining percentage we would release records in part, with some redactions based on the exemptions under the FOI Act.

In the last three years we have had five reviews to OVIC [Office of the Victorian Information Commissioner] where patients have requested a review of our decision under the FOI Act, and on three of those occasions OVIC either dismissed the request or upheld Peninsula Health's decision. One was withdrawn by the applicant, and one was partly upheld in respect of release of information. So I think those numbers demonstrate that Peninsula Health's application of the Act accords with the objects of the Act in section 3 to release information as readily as possible.

On that basis, I am happy to take any questions. That is just an introduction to our service.

The CHAIR: Thank you very much. Mr Mercurio.

Paul MERCURIO: I think you sort of answered this question, but I will ask it and there may be something else that you can add. Could you provide an overview of the kinds of Freedom-of-Information requests that Peninsula Health receives and the reasons for those requests?

Trudy ARARAT: Yes. The overwhelming majority are requests by patients for their information, either by themselves or through their legal representatives. There are varied reasons for those requests – often legal proceedings on foot or to be instituted. But often we do receive a high majority of requests from mental health clients. There does appear to be quite a high cohort of individual patients that are requesting their records without any reason for doing so.

Paul MERCURIO: Just for fun.

The CHAIR: Could I ask, just on that: Are there people requesting through FOI their record for purposes of continuity of care – for example, going to another part of Victoria or something like that?

Trudy ARARAT: We do not really know because we do not ask that question. That is not part of the processing to assess whether it is a valid request. I do understand that because there is no interjurisdictional sharing of medical records that is often the case, but often in those situations it is not the patient requesting their records to take interstate; we get those requests from their interstate treater, and then we release those records outside of the FOI Act because it is for the purposes of ongoing care.

The CHAIR: Understood. And that I think partly answers what I was going to ask, which was about providing access to personal health-related information. First of all, do you use any other scheme, like the *Health Records Act* or the *Privacy and Data Protection Act*, or release things informally? We also heard about portals to electronic medical records, so can you expand on that?

Trudy ARARAT: Peninsula Health has an electronic medical record, but we do not have a portal at this stage, so there is no ability for patients or clients of Peninsula Health to access their records through a portal. As I said before, we have around 13,000 other requests for information outside of the FOI Act. In the majority of those we release information based on the provisions of the *Health Records Act* and they are predominantly for ongoing care. There are also the information sharing schemes that are now in Victoria. We can release information according to those information-sharing schemes, so we can release health information. There is a child-information sharing scheme, there is the domestic-violence information sharing scheme, MARAM, which allows us to release information outside of the *Health Records Act* and the *Freedom of Information Act*. So there are other statutes that allow us to release information for certain purposes.

The CHAIR: Got it. Okay. Mr Batchelor.

Ryan BATCHELOR: Other jurisdictions have slightly different or somewhat different FOI regimes. Have you spoken at all with any of your colleagues or counterparts in other jurisdictions about how their schemes operate?

Trudy ARARAT: No, I have not. I certainly have had lots of discussions with my colleagues in Victoria. I am aware that medical records in New South Wales and Queensland and I believe in WA [Western Australia] are centralised. There is a centralised medical record system. Of course we have a devolved system of governance here – 78 hospitals and health services, each with our own medical record and each with our own obligations in respect of privacy and confidentiality. At the moment there really is not a lot of sharing of information even intrastate, but, no, I actually do not know what the regimes are or how they are administered. I am assuming there would be the same sorts of exemptions in respect of confidential information and personal information that would require careful scrutiny of every single medical record that is produced.

The CHAIR: Just going back to electronic medical records for a second. Do you know how long you have had electronic medical records?

Trudy ARARAT: Since 2012.

The CHAIR: Right. Okay. Does that mean there is actually not much request for information pre electronic medical records?

Trudy ARARAT: No, there is. Our electronic medical records server commenced in 2012, but it has been an iterative process and rolled out across the organisation. So it started in the emergency department and predominantly with prescribing, then over the course of time it has been pushed out across the organisation and now is essentially all encompassing. It is our one source of truth for all services. There are still some community health services that use paper, and that is scanned into the record, but we are predominantly all electronic records now. So we still need to check for any hard-copy records for patients that are requesting records prior to 2012 definitely, but it is still in the process leading up to the current day.

The CHAIR: Thank you. Let us go to Eden Foster.

Eden FOSTER: Great, thank you. Thanks, Trudy. I am going to ask you the same question that I asked the previous person. Again, from a health care perspective, do you have any concerns about the potential transition

to Victoria's push FOI model that promotes proactive and informal release, and are there any possible risks that you can envisage?

Trudy ARARAT: Peninsula Health has adopted an informal push model in respect of providing patients with their discharge summaries. We have always adopted that process since that time I have been there, for eight years. Contained in the discharge summary is the presenting problem, investigations, diagnosis and treatment. Usually it contains radiology results, pathology results, advice and then follow-up care. If a discharge summary is ready and prepared at the time of the patient's discharge, they are provided with that, so that is a push model in some respects. If it is not – and it is often the case that it is not, because patients are discharged at all times of the day and night, 24 hours, and the discharge summary might not have been prepared – then if a patient rings up our privacy and information release unit and wants a copy of their discharge summary, we will give that to them. We will not ask them to do an FOI request. However, for other health records we still require them to make an FOI request.

I believe that unfettered access to the entire health record is problematic, and I say that for a number of reasons. First of all, health records contain confidential information that is given to clinicians and other practitioners in confidence in order to assist with patient assessment and care. Also they may contain the personal information of clinicians, third parties such as Victoria Police, child-protection practitioners, private practitioners and GPs, and obviously we need to protect that personal information. Peninsula Health's view is that we do not want a paternalistic approach, and I think our numbers speak for themselves in that the majority of times we release information in full. But there still needs to be some oversight and scrutiny of medical records when it comes to confidential information, personal information and, also, at times, internal working documents.

Eden FOSTER: You mentioned mental health clients tend to be the highest cohort that are seeking their information. In terms of redactions and things like that, would there be a bit of a change in how you might redact?

Trudy ARARAT: No. The exemptions are the exemptions, and our staff, although there are not many of them, are trained carefully in applying the exemptions in accordance with the objects of the Act. So we would err on the side of release rather than not. It does not matter whether they are mental health clients or surgical clients or medical clients; everyone is treated the same.

Eden FOSTER: I guess another follow-up question: if Victoria was to go to the push model, would there be any concerns in terms of a cultural shift in the way medical records are documented by medical staff?

Trudy ARARAT: Well, I think that is the risk. That is the risk, and that is something that would need to be taken into account. It is imperative that clinical staff communicate and document effectively for the patient's ongoing care. That is our source of truth. That is the clinician's source of truth. If you are coming in three days after an event, you need to be able to go and see what has happened. I think with case conferences, when you have got a lot of people in the room – you might have social workers in the room; you might have people from other organisations, NDIS, their caseworkers – there has to be some degree of protection from the release of confidential or personal information. I think otherwise the medical records should be readily available to the patients.

Eden FOSTER: Okay. Thank you.

The CHAIR: Thank you very much. Kim Wells.

Kim WELLS: Just to follow up something you said earlier, would it not be easier if there was just one central body that handled the health records for those 78 bodies throughout Victoria, rather than the system we have at the moment, where each hospital looks after their own?

Trudy ARARAT: I am not sure. I cannot answer that, because I actually do not know what the benefits are of the New South Wales or of the centralised system. There have to be some benefits to a centralised system, and currently there is movement in place to develop a Statewide electronic health record. It is certainly in the legislation in the *Health Services Act* for that to be developed, so that there is easier sharing of health information across the health services.

It is difficult when you have a patient that has been in your health service and then, for example, they have been out at Peninsula Health for a week, they are discharged, they go to Monash and they say, 'I have been recently at Peninsula Health'. Unless the patient turns up with their discharge summary, they then have to contact us. We will then release the information, but that takes time. So if there was access to a centralised system, where again perhaps another health service is able to access, for example, a discharge summary, pathology results, radiology results, I think that that would definitely facilitate patient care across the State.

Kim WELLS: I was thinking about a guy who has been a long-term patient at a small country hospital, then has to go to, say, Peninsula Health or the Royal Melbourne. If they are on a paper system, although they are slowly trying to come up to an electronic system, it would make it incredibly difficult.

Trudy ARARAT: Yes.

Kim WELLS: Okay. My next question is similar to one I asked before; that was the issue about, from a health care perspective, retaining the statutory exemptions relating to health-related information. In relation to internal working documents – which I think you asked before, Tim – are legal proceedings and personal privacy issues important?

Trudy ARARAT: Yes, I believe they are. Entries in our medical records can contain a lot of personal information: personal telephone numbers, names of people. Our clinicians are obliged under certain legislation to make mandatory reports to organisations such as child protection. We think it is important to protect the identity of the person that is making those reports. They are obliged to do so, but if that information is released then there could definitely be fear of retribution. And I think in respect of the confidential information, it is also really important to maintain that exemption. Obtaining collateral information is really essential in respect of medical care. If we had a situation where a family member or a friend or a GP or a private practitioner was concerned that their confidential information would be released to the patient and they withheld that essential information because they were concerned about that, that could harm the patient.

If I give you an example: if a patient comes in unconscious, has been at a festival and a friend is there and we say, 'What have they taken?' and the friend says, 'I'm not going to tell you, because that might be written down in the medical record, my name's going to be written down, I could have the police knocking on my door, my friend's going to get charged with a crime for taking these drugs and he's going to get really angry with me.' We need to know what that patient has taken. In those situations, it is really imperative that the exemption of confidential information is maintained. Under the *Health Records Act*, the difference between the *Freedom of Information Act* and the *Health Records Act* in respect of confidential information is that under the *Freedom of Information Act*, before we redact or allow confidential information to be released, we need to contact that person. That can be really very onerous, and it can take a lot of time to do that. Under the *Health Records Act* there is no obligation to contact the person who has provided the confidential information to find out whether they are happy for us to release it or not.

Kim WELLS: Okay.

The CHAIR: Just on that, can I just clarify: under the *Health Records Act* there is no obligation to contact them, but –

Trudy ARARAT: We can redact it.

The CHAIR: you have the option, so essentially you are asked to use your judgement on this.

Trudy ARARAT: Yes.

The CHAIR: Right. Okay, thank you.

Kim WELLS: The Committee has received evidence – I asked this question before as well – that access to personal and health-related information be separate from the FOI scheme. Do you have a view on that?

Trudy ARARAT: My view is this: the medical records, as it stands, are not an individual's property – they are the property of Peninsula Health, and we are a government entity. If you are considering what the FOI Act is, it is about release of government material, government documents. Medical records are, at this time, government documents. If you moved it to an alternative piece of legislation – for example, the *Health Records*

Act – then the safeguards contained in the FOI Act would need to be, in our view, maintained in one other piece of legislation that you are enacting or amending to make it work.

The *Health Records Act* has some real problems, as it is currently drafted, in respect of releasing information. So there is no ability to re-scope – we cannot go to the patient and say, 'Look, you know, you're asking for 20 years of records; this is going to take us a very long time to do. What is it that you really want?' There is no scope to do that under the *Health Records Act*. The *Health Records Act* has a strict time frame – 45 days – to release the information. The *Freedom of Information Act* allows a hospital to contact the requester and say, 'This is going to take us bit longer than the 30 days that is legislated,' and you can work that out. There is no room for that under the *Health Records Act*.

Also, the *Health Records Act* has some interesting provisions in respect of review of a decision, and as it currently stands under the *Freedom of Information Act* the review is by making an application to OVIC, and then that is reviewed. Under the *Health Records Act* the review process is that the requester makes a request to another health service to review the decision of the initial health service, which when you think about the resourcing of FOI in Victorian public health services is just really putting increased demand on already overstretched corporate departments in a public hospital. Then if the second hospital upholds the first hospital's decision, then they can go to the Health Complaints Commissioner to have that decision reviewed, and if they are not happy with that, then they go to VCAT [Victorian Civil and Administrative Tribunal]. So there is this extra step in the *Health Records Act* that is not contained in the *Freedom of Information Act*; that, I think, is really problematic.

Otherwise, the exemptions contained in part 6 of the health privacy principles really are probably on equal par with the FOI Act, so that is not a problem, but there are these sorts of administratively burdensome provisions in the *Health Records Act* that would make it very difficult without legislative amendment for it to be transferred to that Act.

Kim WELLS: Thanks.

The CHAIR: We have got time for a couple more questions. I am going to bowl one up first. Actually I forgot – I have got one over here. I am just going to ask this anyway: What about a system where the hospital had the discretion to decide whether or not to consult third parties? For example, there must be a lot of third-party information, say, from relatives that is kind of not at all sensitive and would not be harmful at all, such as someone's ability to walk upstairs; then there must be some other material that is very clearly sensitive and confidential and you do not need to consult – you know it cannot go out; and there is probably some stuff in the middle where you think actually you should consult. Would a system that gave the hospital discretion to decide where it sat be helpful?

Trudy ARARAT: Absolutely. At the moment we have to consult with everybody. If there is an assessment that this is confidential information provided, then we have to consult with that person.

The CHAIR: So if it is third-party information but it is like, 'Mum can't walk up the stairs,' it might be decided that that is not confidential.

Trudy ARARAT: Yes.

The CHAIR: Okay.

Trudy ARARAT: Yes, it has to be given in confidence, so it is information provided in confidence. Often in the medical record you will have a note that says 'in confidence' written on it, but that is not always the case, so that is why the FOI readers and decision-makers have to scrutinise every single entry in the medical record to determine whether it is an entry made in confidence.

The CHAIR: Got it. Thank you very much.

The CHAIR: I am interested in hearing more about – and I think you referenced this in your submission – the electronic patient health-information sharing system. Correct me if I am wrong, but that is not up and running yet, is it?

Trudy ARARAT: No.

The CHAIR: It could potentially – whether it should – include functionality for the public to obtain their information, a bit like the Commonwealth My Health records.

Trudy ARARAT: I think with My Health Record – because it was an opt-out program, and we had a lot of people opting out – what our experience has been at Peninsula Health is that it is a really highly regulated system in respect of safety. It is a very safe system, and certainly if there are any instances where a My Health Record has been accessed at Peninsula Health outside of the prescribed reasons, we are notified immediately and we have to investigate and provide a response.

The CHAIR: Are you talking about your in-house electronic record?

Trudy ARARAT: No, the My Health Record. For example, a patient will come to our hospital and they will have a My Health Record. We need their consent to access their My Health Record. In some circumstances we might not have their consent. There might be a reason why we have done that that is within the bounds of the legislation, but that is not apparent, and there are safeguards built into the system that trigger off an alarm to the authority managing My Health records and we will get a letter to the Chief Executive that says, 'This patient's My Health Record was accessed at this time. Please provide us with a reason why.' I think if those sorts of safeguards were built in to the Victorian electronic records sharing system, then that would certainly eliminate the requests that we have for discharge summaries outside of our push system and provide patients with access to their radiology results and pathology results, which is often what is needed at that time. I think that that is something that should definitely be considered, and I think it would be welcomed by Peninsula Health.

The CHAIR: Yes. Good. Thank you. Other questions from other Committee members.

Ryan BATCHELOR: I was going to ask about re-scoping, but you answered the question I had not yet asked in answering Mr Wells.

The CHAIR: We asked the previous witness, but do you have any comment on the impact of the electronic medical record on the workload of your FOI staff?

Trudy ARARAT: In respect of reading the record, it makes no difference. In fact there are more documents in an electronic health record than what there were in paper records, so that has increased. I mean, firstly, they are legible, which is fabulous, and that is clearly a great help to our readers to be able to read very clearly what has been documented. There is certainly less of an administrative burden in respect of having to recall records that are held offsite. As time goes on, less and less records are being held offsite, hard copy records, so that is certainly helpful. There is less requirement to print and copy because we have the ability to download records and then send them to patients in a secure electronic manner, which is very helpful and does facilitate the process but otherwise, not really. No.

The CHAIR: Again, I asked previously, I am wondering about, potentially, and this is a kind of a hypothetical, if a system could be designed where an electronic medical record could quarantine sensitive information? Could that reduce the workload of your team?

Trudy ARARAT: I think the problem is that that information is essential for ongoing care for the next person that is coming on. You already have a situation where you have got a number of tabs across a screen that clinicians have to click into. If you have another tab where something is taken off, then there is just the risk that it will be missed and it is essential information that might be missed because somebody has not clicked onto that tab. Whereas if there is the tab of clinical records documentation, just progress notes, and that is going to be contained there, they are always reviewed. It is just a risk that it might be missed, I think, if you sequester it from the other part of the record. There are alerts and alarms, but clinicians also become immune to alerts and alarms, things that you see every day, so we are reluctant to put more alerts and alarms on medical records.

The CHAIR: Great. All right. Thank you very much.

Trudy ARARAT: Thank you.

The CHAIR: Thank you for making the effort to make a submission and come along. We will suspend the hearing now for a few minutes until our next witness.

Witness withdrew.