

26 June 2024

Dr Tim Read MP
Committee Chair
Integrity and Oversight Committee
Parliament of Victoria
EAST MELBOURNE VIC 3002

By email: ioc@parliament.vic.gov.au

Dear Dr Read

Integrity and Oversight Committee's Inquiry into the Operation of the Freedom of Information Act 1982 (Vic) (FOI Act)

I refer to your letter of 16 May 2024 and the two questions on notice where you seek my response.

The role of the HCC

The Health Complaints Commissioner (**HCC**) is an independent and impartial statutory office established under the *Health Complaints Act 2016* to receive and deal with complaints about health service providers in Victoria.

The HCC also handles complaints about the management of health information under the *Health Records Act 2001* (**HR Act**) which includes collection, use, disclosure and access to health information. The HR Act establishes Health Privacy Principles (**HPPs**) that apply to health information collected and handled in Victoria.

Right of access and right to have health information made available to another provider

The HR Act gives individuals a right of access to their personal health information held by any organisation in the private sector in Victoria, in accordance with HPP 6. HPP 6 obliges private sector organisations who hold health information about a person to give them access to their health information on request, subject to certain exceptions and the payment of fees. Mandatory and discretionary refusal grounds in response to an access request are set out in the HR Act.

The HR Act requires an organisation to respond to a request for access not later than 45 days from the date it received the request. Once the individual is notified in writing of the fee that will be charged, access must be provided within 7 days after payment of the fee or 45 days after receiving the request, whichever is the later. Maximum fees that can be charged are set by the Health Records Regulations 2023, which are indexed annually.

In addition, HPP 11 of the HR Act gives an individual the right to have their health information made available to another health service provider, subject to the payment of any fee. The request must be complied with as soon as practicable and the HCC considers 30 days to be a reasonable time. This right does not exist in the FOI Act.

Introductory comments

The HR Act has been in operation since 1 July 2002, when health information management was to a large extent paper-based. In those 22 years, the HR Act has not been reviewed. There have been numerous consequential amendments to the HR Act as a result of other legislative changes but no review of the HR Act has taken place. As a result, the HR Act has not kept pace with advances in health care delivery, with community expectations and with the transition to a largely digital environment for health records. The provisions relating to access to deceased records in the HR Act are inadequate and inconsistent with the requirements of modern legislation.

Response to questions on notice

I respond to the two questions on notice as follows.

1) What are the benefits and drawbacks of the statutory release scheme for health information under the Health Records Act 2001 (Vic)?

HCC response

I have reviewed the submission made to the Committee by the Office of the Victorian Information Commissioner dated 15 January 2024 (the **OVIC submission**) and largely endorse the observations and recommendation in relation to consumers accessing their personal information, including health information. Many of the inadequacies of the FOI Act in relation to people accessing their personal information identified in OVIC's submission apply equally to the HR Act.

Some of the procedural requirements for making an access request under the HR Act appear more straightforward than the FOI Act. Yet the process is essentially the same, whereby an individual contacts the private sector organisation, makes a request for access to their health information (or the health information of another person if they are an authorised representative), identifies what information they are seeking and waits for a response within the legislated time frames. The organisation advises the individual of any fees to be charged and if any exemptions to access apply.

One of the benefits of the HR Act is that no application fee is required to make an access request, unlike the FOI Act. Yet as the HR Act covers private sector organisations, there is no statutory requirement to waive access fees, and the calculation of the applicable fees is confusing for organisations and consumers. The HCC is regularly required to deal with disputes about fees, which delays consumers' timely access to their personal health records. The mandatory and discretionary grounds for refusal of access to health information in the HR Act are detailed, and while not often applied in our experience, can be considered to be overly complex and not well understood.

The HCC provides free training for staff at Victorian organisations who deal with the collection, handling or disclosure of health information. However, the HCC's experience is that many private health service providers do not have sufficient understanding of their obligations to provide access to health information under the HR Act. Our experience is that a number of private health service providers are small businesses or sole proprietors and do not have adequate systems and processes in place for dealing with access requests under the HR Act. This contrasts with public sector health providers who employ appropriately trained staff to manage patient requests for their personal health information.

2) The Committee has received evidence that access to health information should be separate from the Freedom of Information scheme. What is your view?

HCC response

The HCC endorses the comments at paragraphs 301, 304 and 305 of OVIC's submission as follows:

301. .. the Committee may wish to consider simplifying the regulation of privacy in Victoria by consolidating the HPPs and the IPPs, and moving the HPPs to OVIC to regulate. This would assist individuals to access their own information by being able to seek access under fewer laws for both their health information and their personal information.

304. A legislative pathway in the ATI law that authorises informal release would enable agencies and Ministers to provide efficient and timely access to personal and health information. Access under this pathway would still need to comply with the IPPs in the PDP Act, but would protect agencies and Ministers from civil and criminal liability for disclosures made in good faith.

305. This would give agencies and Ministers a firm foundation to set up informal release access schemes, such as for providing patient files in hospitals by way of an online patient portal, without processing them under the Act.

I agree with OVIC's suggestion to simplify regulation of privacy by consolidating the HPPs and the IPPs and moving the HPPs to OVIC to regulate. There is likely significant benefit to have one regulator overseeing the legislation governing access to both personal health information in the public and private sectors. Benefits include simplified processes for consumers, streamlined regulation, reduced duplication, reduced complexity and risk for confusion.

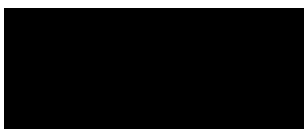
I also endorse the comments at paragraph 287 of OVIC's submission as follows "*Individuals should have the option to access their information through simpler and more cost-effective means, such as through informal release schemes or other, less prescriptive legislation*". I note that a number of public hospitals have developed a patient portal which allows patients to access their health information online. While this has been done under the current legislative framework, I agree with OVIC that legislative authority is required for agencies to provide access to information outside of FOI, and this would also apply to the HR Act.

A scheme such as a patient portal would present challenges for private sector health service providers, due to the variation in medical records software in use by private practices, and the variation in the size and resources of private health providers. The advantage of OVIC regulating access to both public and private sector health information is that any legislation can be tailored to the different needs of public and private sector organisations.

I agree with OVIC's position that protection from legal liability arising from informal release needs to be provided, at the same time acknowledging that confidential information of other people needs to be protected when providing access. This could include, for example, situations where an organisation releases information of a child to a separated parent, where the confidential information of the other parent contained in the records of the child needs to be protected.

I hope that this information adequately addresses your questions.

Yours sincerely



Adjunct Professor Bernice Redley
Health Complaints Commissioner