



ACT
Government



VICTIM SUPPORT
PROMOTING RIGHTS & RECOVERY

Policy - Request for Access to Records

Policy Statement

Victim Support ACT (VSACT) delivers the Victims Services Scheme, which under the *Victims of Crime Act 1994* is declared to be a health service provider for the *Health Records (Privacy and Access) Act 1997* (Health Records Act). The Health Records Act accordingly applies to any health record held by the Victims Services Scheme in relation to a victim.

The Health Records Act deals with privacy issues in relation to health records and gives clients of a health service a right to access information in their health records, subject to a number of conditions. The Health Records Act also provides procedures to be followed when a client makes a request for access.

Purpose

The purpose of this policy is to provide VS ACT staff with broad information about client requests for access to health records, other responsibilities under the Health Records Act and the processes to be undertaken prior to the release of records.

Scope

It applies to the Victims of Crime Commissioner and all VS ACT staff, whether they are permanent, temporary or casual who record information within client records that relates to the victims services scheme.

This policy does not cover access to records under the Financial Assistance Scheme.

Background – *Health Records (Privacy & Access) Act 1997*

Access to health records by persons other than the client

A record keeper who has control of a health record must not disclose personal health information about a client (about whom a record has been created) to someone other than the client, unless the Act provides for disclosure to someone else.

Who is entitled to access?

The following people may be entitled to access a client's health record:

- The health service provider;
- Members of a treating team;

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- A person authorised by the client to have access which may include a legal representative;
- A parent or guardian;
- A legal representative of a client who has died;
- People who need access to a record for the purpose of managing, funding or assessing the quality of the services provided by the victim services scheme; and
- In certain circumstances:
 - an immediate family member of the client;
 - the person responsible for the client's care; and
 - an entity carrying out research or compilation or analysis of statistics.

At VS ACT, the 'treating team' includes the health professional officers involved in the assessment, care or treatment of a client for a particular episode of care. If it is not obvious from the circumstances, the client must be informed about who is included in the treating team.

A current health service provider external to VSACT, named by the client *and* the referring health service providers, if any, are also considered to be members of the treating team.

The Victims of Crime Commissioner, and staff who support the Commissioner to deliver his functions, are entitled to access a client's health record in order to manage the Victim Services Scheme.

VS ACT administrative staff are also entitled to access relevant parts of a client's health record in order to manage the Victim Services Scheme e.g. to facilitate payment of invoices.

Other personnel conducting funding or quality functions may entitle them to have access to a health record for those purposes only, and to have access only to the relevant parts of a record. This allows information management, quality improvement and auditing processes to be conducted in the course of conducting official duties.

What records are covered by the legislation?

Personal information held by health service provider

Any record held by a health service provider containing personal information is covered by the legislation. A health service provider includes any person or organisation providing a health service in the ACT. A health service is defined very broadly¹. The definition covers any activity to assess, record, improve or maintain the physical, mental or emotional health of a client, and includes a disability, palliative care or aged care service.

Responsibilities of record keepers

Schedule 1 of the Act specifies the privacy principles. VS ACT complies with these principles by keeping records for the following periods:

¹ Defined in s4 *Health Records (Privacy and Access) Act 1997*

- For clients 18 years of age or more, seven years from the date the last entry was made; and
- For clients less than 18 years of age, seven years from the date the consumer turns 18, that is until the client turns 25.

VS ACT is also required to keep a register of records that have been destroyed or transferred to another entity.

A record keeper must not alter or destroy a health record about a client, even if it is later found or claimed to be inaccurate. Any inaccuracies can be corrected by a later entry or, if necessary, separated from the main record. For example, an inaccurate record may be kept in a sealed envelope. If a record is sealed, only the VoCC or the VS ACT Director may access that information.

Access to health records by the client

A client has a right of access, in accordance with the Act, to a health record held by a health service provider or to a record held by anyone that contains their personal health information.

Forms of access

There are three forms of access described in the legislation. They allow a client to:

- Inspect the health record
- Receive a copy of the health record or, if the client agrees, an accurate summary; or
- View the health record and have the contents explained

The choice about the form of access lies with the client but, once a request has been made, the record keeper may offer to:

- Discuss the record with the client, even if an explanation has not been requested; or
- Provide a summary of the record to the consumer rather than the whole record.

The client may accept or reject these offers.

An offer to discuss a record is intended to improve communication between the client and the health service provider and to avoid situations where records may be misinterpreted. If there is a concern that their interpretation might lead to harm to a person, the record keeper may exempt the record from viewing by the client.

The option to provide a summary of a record is intended to allow health service providers who keep up to date summaries to provide the information in a way that may be easier to understand and more helpful for the client than an entire record.

Child or young person

The right of access to a health record for a consumer who is a child (under the age of 12 years), is exercisable on behalf of the child by the person with parental responsibility for the child. Noting that a foster parent does not have parental responsibility for a child.

The right of access to a health record for a consumer who is a young person (12 years old or older but not yet 18 years old) is exercisable by the young person if they have sufficient maturity and

developmental capacity to understand the nature of the request to access a health record and the nature of the record—by the young person personally; or in any other case—on behalf of the young person by the person with parental responsibility for the young person for example a legally appointed guardian or an attorney with the power to make decisions about the young person's medical treatment or health care.

The treating health professional must make the assessment of the young person's capacity to request a copy of their health record.

Deceased client

Where the client is deceased, authority from the client's legal representative is required e.g. Executor of the client's will or Administrator of the client's estate. In circumstances where there is no legal representative, an immediate family member may be granted access to personal health information of a deceased client for compassionate reasons where such disclosure would have been expected by the client and is not contrary to any wishes expressed by the client².

ACT Government Solicitor access

When the ACT Government Solicitor is acting on behalf of the Health Directorate, Privacy Principle 9(e) and 10(e)3 allows for the disclosure of personal health information, if the disclosure is necessary for the management, funding, or quality of the health service provided. Release of information should be made through the Clinical Record Service. Requests from the ACT Government Solicitor, when acting on behalf of a different Directorate, will be treated as routine third party requests and will require client consent.

Exemptions - Grounds for non-production or refusing access

The requestor must be notified in writing of any decision to exempt all or part of the record from disclosure, and be advised of the reason for the exemption i.e. the section of the Act that applies.

Any such decision regarding exemption can be the subject of review by the Health Services Commissioner at the request of the client. The Commissioner's decision can also be subject to review by the ACT Magistrate's Court. Current exemptions under the Act are:

- **Record relates to a complaint under *Children and Young People Act 2008***
Access cannot be given to a health record or part of a health record if the record (or part of the record) relates to such a report made under the *Children and Young People Act 2008*, section 354 or 356, or if the identity of the person who made the report can be determined from information in the record.
- **Risk to the life or health of the client or another person**
Section 15 of the Act prevents access to records where provision of the information would constitute a significant risk to the life or the physical, mental or emotional health of:
 - (a) the client; or
 - (b) any other personWhere the health service provider considers that provision of the information would

² s13b (3)(c) ii B Health Records (Privacy & Access) Act 1997

³ Schedule 1 Health Records (Privacy and Access) Act 1997

constitute a significant risk to the life or the physical, mental or emotional health of the client, they can offer to discuss the health record with the client (Section 16).

- **Record contains information specified as “Given in Confidence”**
Access may not be granted where all or part of the record consists of material or information given in confidence, to the person writing the record, and the entry is marked as “given in confidence” at the time the entry was made.
- **Counselling records regarding sexual assault**
Division 4.5 of the *Evidence (Miscellaneous Provisions) Act 1991*, Sections 55 and 56 provides for counselling 'communication' regarding sexual assault to be deemed to have protected confidence. Sections 57 and 58 provide immunity from disclosure under subpoena for documents recording a protected confidence in both criminal proceedings and preliminary criminal proceedings.

The process of seeking access to a health record

In most cases the process for seeking access to a health record is relatively simple:

- The client, or the client’s representative, approaches the record keeper and asks for access; and
- The record keeper reviews the record and responds to the client to let them know where, when and how access can be provided.

The request

A person wishing to gain access to a personal health record may make a written or verbal request for access to the record. The record keeper may ask that the request be in writing. If someone other than a client (or a parent who has consented to the treatment of the child within the last twelve months) is making a request it must be in writing. Where a person authorised by the client is seeking access, that person must have a written authority, signed by the client.

The request must contain;

- The name and address of the client;
- Sufficient information to identify the record to which access is sought; and
- The form of access sought.

How access is to be given

In giving access to a health record, the record keeper must:

- If the person wishes to inspect the health record, indicate a time and place where this can occur;
- If the person requests a copy of the health record or a summary, give a copy of the health record or summary; or
- If the person wishes to view the health record and have its content explained, indicate a time and place when an explanation can be given by a qualified health service provider.

The record keeper is entitled to request:

- Proof of the identity of the person making the request; and
- Proof that the person seeking access has the proper authority.

A person who obtains access to personal health information by false representation and without proper authority commits an offence⁴. A record keeper who provides access to a health record in good faith and not knowing the request is defective is not legally liable.

Access to a health record

Having received the request, the record keeper may find it necessary to review the record in order to determine whether the information being requested is available and whether any part of the record should be exempt.

Within two weeks after the day the request is received, the record keeper must⁵:

- Give notice if the health record, or part of the record, cannot be produced and provide reasons;
- Give notice if the health record, or part of the record, is exempt from access and state the grounds for the exemption;
- Give access to the health record in accordance with the Act; or

Access authorised by Court Order

Subpoena

For the purpose of this policy, a subpoena is a legal document requiring the production of a document. A person may be summonsed to appear in court to provide the subpoenaed document. - A subpoena served on Victim Support ACT for health records or health information is to be addressed to the Team Leader, who will action the subpoena.

Having been served a subpoena, the Team Leader will co-ordinate the release of the information together with the Case Manager and seek ACT Government Solicitor advice as required.

Subpoenas involving Victim Support ACT staff should be served on the Victim of Crimes Commissioner if the staff member is to attend court.

Any Writ or Statement of Claim where Victim Support is named as a party or is the alleged wrongdoer should be immediately provided to the Victims of Crime Commissioner to progress to seek advice from the ACT Government Solicitors for insurance purposes.

⁴ s20(2) *Health Records (Privacy and Access) Act 1997*

⁵ s13(2) *Health Records (Privacy and Access) Act 1997*

Search Warrant

ACT Law requires compliance with a search warrant and record keepers are advised that they should inform Victims of Crime Commissioner of any official demand for access to data, who in turn will seek advice from the ACT Government Solicitor as soon as the warrant is served.

Notice of Non-party Production

Pursuant to order 34B(2) of the Supreme Court Rules, a party to an action can apply to the Registrar of the Supreme Court to issue a Notice requiring Victim Support ACT to produce documents for inspection to the Applicant or the Applicant's solicitor within 14 days (or longer if specified in the notice). All other parties to the action are served with a copy of the Notice of Non-Party Production. Any other party can inspect the documents for the purpose of deciding whether or not to make a claim to the Court for privilege or objection in relation to certain documents, before the Applicant inspects them.

Access authorised by Statute

Where access to health records or provision of access is required or authorised by a law of the Territory, a law of the Commonwealth or an order from a court of competent jurisdiction, **client consent is not required.**

- Under Section 5 of the *Health Records (Privacy and Access) Act 1997*, the Privacy Principles can be disregarded if, to adhere to them would contravene a law of the Territory, Commonwealth or an order of a court of competent jurisdiction

- Requests must be in writing and include details of the relevant legislation and section that authorises the access. The fact that a law authorises disclosure may not be sufficient to require disclosure in every case.

- The following list includes some of the applicable legislation. Each request should be assessed on merit and if in doubt of the validity of such a request, confirmation from the ACT Government Solicitor should be obtained:

- ***Adoption Act 1993***

Requests by an adopted person for information from their mother's record (without the mother's written consent) must be refused under the Health Records (Privacy and Access) Act 1997. However, in some circumstances, release of information may be authorised under the Adoption Act 1993 (Part 5). Any request for information regarding records pertaining to adoption are to be referred to the Director-General, Justice and Community Safety.

- ***Children and Young People Act 2008***

Section 862 of this Act permits release of personal health information without patient consent, to the Director-General who has responsibility for Care and Protection Services. Any request for information under this provision are to be referred to the Victims of Crime Commissioner.

- ***Coroners Act 1997***

Under Section 43 of the *Coroners Act 1997*, the Coroner may issue a summons requiring a person to produce a document, including a health record, to the Coroner's Court. This summons must be complied with in the same manner as subpoenas and summons generally. Further, under Section 21 of the *Coroners Act 1997*, the Coroner may order the Health Directorate to provide the health records for the assistance of a post-mortem examination.

▪ **Privacy Act 1988 (Commonwealth)**

In circumstances where the *Health Records (Privacy and Access) Act 1997* is silent regarding the disclosure of personal information, Information Privacy Principle eleven of the *Privacy Act 1988* can be relied on. This principle limits the disclosure of personal information in the following circumstances where:

- (a) *The individual is reasonably likely to have been made aware (or made aware under PI 2) that such information is normally passed to that person*
- (b) *The individual has consented to the disclosure*
- (c) *The record-keeper has reasonable grounds to believe the disclosure is required to prevent or lessen a serious and imminent threat to life or health of the individual or some other person*
- (d) *The disclosure is required or authorised under law; or*
- (e) *The disclosure is reasonably necessary for the enforcement of criminal law or a law imposing a pecuniary penalty, or for the protection of public revenue*

- **Social Security Administration Act 1999 (Commonwealth)** Section 196 of this Act permits release of personal health information to Centrelink, without client consent, in some circumstances. The requests must be in writing and provide specific details of the section authorising access

Requests by the Media

No information about any client should be released without the client's express permission. All media enquires should be referred to the Victims of Crime Commissioner.

Urgent requests

Urgent requests should be actioned as soon as possible.

Urgent requests once established, must be completed by the record keeper within 7 days after the day the transfer request (when another health service requests information) is received⁶.

Fees for access

VS ACT **does not** currently charge a fee for access to health records.

⁶ Schedule 11 & 12 *Health Records (Privacy and Access) Act 1997*

Evaluations

Outcome Measures

- VS ACT prepares all records for release in stipulated timeframes as per the Act.
- VS ACT provides information to clients accessing the service as to how they may access their records and on the VSACT website.

Method

- VS ACT maintains a register of all requests for records.
- VS ACT provides and receives completed Request for Access Records form from clients and/or authorised persons prior to releasing information.

Related Legislation, Policies and Standards

Legislation

Health Records (Privacy & Access) Act 1997

Victims of Crime Act 1994

Victims of Crime Regulation 2000

Human Rights Act 2004

Policies

ACTPS Integrity Policy 2010

ACTPS Standards for the Conduct of Inquiries and Investigations 2010

ACTPS Code of Conduct

ACTPS Code of Ethics

JACS Records Management Policy

JACS Gifts, Benefits and Bribes Policy

Standards

Public Sector Management Standards 2006

ACT Public Service Code of Ethics

Allied Health Professionals ACT Standards of Practice