
NEXT OF KIN AND FREEDOM OF INFORMATION

FOI Practitioners' Forum – Health
Sector

6 June 2017



Outline of Presentation

- The relevance of an FOI applicant's status as the next of kin of a deceased person, when considering a request for access to the deceased's medical (or other) records
- Who to notify, under section 33(3) of the FOI Act, of a decision to release a deceased person's records

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TABLE OF PROVISIONS

<i>Section</i>	<i>Page</i>
Part I—Preliminary	1
1 Short title and commencement	1
3 Object of Act	2
4 Act binds the Crown	2
5 Definitions	3
6 Act not to apply to courts etc.	11
6AA Act not to apply to access to certain documents of Freedom of Information Commissioner	12
6A Relationship with other laws	12
Part IA—Freedom of Information Commissioner	14
6B Freedom of Information Commissioner	14
6C Functions and powers of Freedom of Information Commissioner	14
6D Appointment of Freedom of Information Commissioner	15
6DA Appointment of Assistant Commissioners	15
6DB Functions and powers of Assistant Commissioners	16
6DC Assistant Commissioner is responsible to Freedom of Information Commissioner	17
6E Terms and conditions of appointment	17
6F Remuneration	18
6G Vacancy and resignation	18
6H Suspension and removal from office	19
6I Acting Freedom of Information Commissioner and Assistant Commissioners	20
6J Staff	21
6K Delegation	21
Part IB—Professional standards	23
6L Development of professional standards	23
6M Compliance with professional standards where prescribed by regulations	24

Authorised by the Parliamentary Counsel

1

Next of Kin and the FOI Act

The FOI Act does not include a definition for “next of kin”.

In relation to s 33 of the FOI Act, it arises:

- when determining whether release would be unreasonable (s 33(1)); and
- in notifying third parties of appeal rights (s 33(3)).



Section 33(1) – next of kin and unreasonable disclosure

- Common misconception – an applicant must be the next of kin to request access.
- An applicant's status as next of kin is relevant, but not determinative, when deciding whether release of personal affairs information would be unreasonable under s 33(1).

Section 33(3) – Notifying the Next of Kin

- It is necessary to identify the next of kin where a decision has been made to release information relating to the personal affairs of a deceased person.
- Section 33(3) requires that, in the case of a deceased person, that person's next of kin must be notified of their rights of appeal under section 50(3) to the VCAT.
- This gives the person best placed to represent the interests of the deceased person a right to appeal.
- Must notify the next of kin if “practicable”.

Who is the Next of Kin?

- The term “next of kin” is not defined in the FOI Act.
- Victorian Ombudsman's June 2006 Report on the FOI Act recommended that the definition in the *Human Tissue Act 1982* be adopted.
- The absence of a definition gives greater flexibility.
- We recommend taking a common sense but consistent approach, using a definition that is relevant to your particular setting.



Next of kin

Section 33 requires an agency to notify a deceased person's 'next-of-kin' of a decision to release information relating to the personal affairs of the deceased person. There is no definition of 'next-of-kin', and several agencies have expressed their concern at the uncertainty created by this. Section 3 of the *Human Tissue Act 1982* has a suitable definition.

Recommendation

I recommend that section 33 be amended to adopt the definition of 'next of kin' in section 3 of the *Human Tissue Act 1982*.

Human Tissue Act 1982 (Vic)

Section 3 of the *Human Tissue Act 1982* (Vic) provides –

3

Definitions

(1) In this Act, unless the contrary intention appears—

...

next of kin means—

(a) in relation to a child—a person referred to in subparagraph (i), (ii) or (iii) of paragraph (a) of the definition of **senior available next of kin**; and

(b) in relation to any other person—a person referred to in subparagraph (i), (ii), (iii) or (iv) of paragraph (b) of that definition;

...

senior available next of kin means—

(a) in relation to a deceased child—

(i) where a parent of the child is available—a parent of the child;

(ii) where a parent of the child is not available—a brother or sister of the child who has attained the age of eighteen years and who is available; or

(iii) where no person referred to in subparagraph (i) or (ii) is available—a person who was the guardian of the child immediately before the death of the child and who is available; and

(b) in relation to any other deceased person—

(i) where the person, immediately before the person's death, had a spouse or domestic partner and that spouse or domestic partner is available—the spouse or domestic partner;

(ii) where the person, immediately before the person's death, did not have a spouse or domestic partner or the spouse or domestic partner is not available—a son or daughter of the person who has attained the age of 18 years and who is available;

(iii) where no person referred to in subparagraph (i) or (ii) is available but a parent of the person is available—that parent; or

(iv) where no person referred to in subparagraph (i), (ii) or (iii) is available—a brother or sister of the person who has attained the age of eighteen years and is available;

Summary

- The FOI Act does not provide for a definition of “next of kin” – most likely, intentionally.
- A person’s status as next of kin is relevant in two instances for the purposes of section 33:
 1. when determining whether disclosure of personal affairs information is unreasonable; and
 2. notifying of appeal rights.
- Status as next of kin is not determinative for the purposes of section 33(1). But it is usually a relevant consideration.
- Prefer a common sense but consistent approach to identifying the appropriate next of kin to notify under s 33(3).

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