Australian Government
Attorney-General's Department

FOI

December 2015

Dear

Freedom of Information Request no. FOI

The purpose of this letter is to give you a decision about access to documents that you requested under the *Freedom of Information Act 1982* (FOI Act).

Summary

I, Susan Robertson, Assistant Secretary, am an officer authorised under section 23(1) of the FOI Act to make decisions in relation to FOI requests.

On 11 November 2015 you requested access to documents relating to the Vienna Convention on the Law of Treaties and the International Covenant on Civil and Political Rights. Specifically you sought access to:

> *1. An Instrument, document, statute or reservation that exempts the Australian Government, the State Governments, the Crown, local government, or any of their agents, delegates or subordinates from strict compliance with The Vienna Convention on the Law of Treaties 1969, to which they are bound by, Entered into force for Australia on 27 January 1980, (AUSTRALIAN TREATY SERIES) regarding any private or public law, whether State or Federal Commonwealth.*
>
> *2. An Instrument, document, statute or reservation that exempts the Australian Government, the State Governments, the Crown, local government, or any of their agents, delegates or subordinates from strict compliance with The International Covenant on Civil and Political Rights 1966, to which they are bound by, Entered into force for Australia 13 November 1980, (AUSTRALIAN TREATY SERIES) regarding any private or public law, whether State or Federal Commonwealth.*
>
> *3. An Instrument, document, statute or reservation that creates a lawful right for a public authority employed or appointed by the Australian government, the State Governments, the Crown, local government or any of their agents, delegates or subordinates, considering any private or public law, whether State or Federal Commonwealth with regards to the rights of Australians to act in a way that is incompatible with a human right or, in making a decision, to fail to give proper consideration to any relevant human right of Australians found within*

The International Covenant on Civil and Political Rights 1966 respective of The Vienna Convention on the Law of Treaties 1969.

I have identified that the Attorney-General's Department has no documents that fall within the scope of your request. I did this by taking all reasonable steps to find the documents, including arranging for a search of the department's electronic documents management systems and making inquiries of staff who may have been able to identify documents within the scope of your request, I am satisfied that the department does not have any relevant documents.

I have accordingly decided to refuse your request for access to the documents. More information, including my reasons for my decision, is set out below.

Decision and reasons for decision

With regard to the documents requested in your application, I have found that:

- the documents you requested about the exemption of government agencies from strict compliance with international treaties signed by Australia, or which create lawful rights for government agencies to act in a way incompatible with human rights, or to fail to properly consider human rights, do not exist (section 24A(1)(b)(ii)) – information about why they do not exist is given below.

Material taken into account

I have taken the following material into account in making my decision:

- the content of the documents that would fall within the scope of your request
- the FOI Act (specifically section 24A(1)(b)(ii))
- the guidelines issued by the Australian Information Commissioner under section 93A of the FOI Act

My reasons for refusing access are given below.

Documents non-existent (s 24A(1)(b)(ii))

Under section 24A(1) of the FOI Act, an agency may refuse a request for access to documents if:

(a) all reasonable steps have been taken to find the document; and
(b) the agency or Minister is satisfied that the documents:

(i) are in the agency's or Minister's possession but cannot be found; or
(ii) do not exist

After taking all reasonable steps to find documents within the scope of your request, I am satisfied that the department does not have any documents relating to your request.

Your application refers to the protection of human rights in Australia. Australia is founded on the rule of law and has a strong tradition of respect for the rights and freedoms of every individual. Australia is a party to seven core international human rights treaties, providing an agreed set of human rights standards and establishing mechanisms to monitor the way that a treaty is

implemented. Under Australian law, a treaty only becomes a direct source of individual rights and obligations when it is directly incorporated into domestic law. Human rights are recognised and protected across Australia through a range of laws at the federal and state and territory levels, the Australian Constitution, and the common law. Further information about the ways in which human rights are protected in Australia is available on the Department's website: http://www.ag.gov.au/RightsAndProtections/HumanRights/Pages/default.aspx

Your review rights

If you are dissatisfied with my decision, you may apply for internal review or Information Commissioner review of the decision. We encourage you to seek internal review as a first step as it may provide a more rapid resolution of your concerns.

Internal review

Under section 54 of the FOI Act, you may apply in writing to the Attorney-General's Department for an internal review of my decision. The internal review application must be made within 30 days of the date of this letter, and be lodged in one of the following ways:

email: foi@ag.gov.au
post: Freedom of Information and Privacy Section
Office of Corporate Counsel,
Attorney-General's Department,
3-5 National Circuit
Barton, ACT 2600

Where possible please attach reasons why you believe review of the decision is necessary. The internal review will be carried out by another officer within 30 days.

Information Commissioner review

Under section 54L of the FOI Act, you may apply to the Australian Information Commissioner to review my decision. An application for review by the Information Commissioner must be made in writing within 60 days of the date of this letter, and be lodged in one of the following ways:

online: https://forms.business.gov.au/aba/oaic/foi-review-/

email: enquiries@oaic.gov.au

post: GPO Box 2999, Canberra ACT 2601

in person: Level 3, 175 Pitt Street, Sydney NSW

More information about Information Commissioner review is available on the Office of the Australian Information Commissioner website. Go to http://www.oaic.gov.au/freedom-of-information/foi-reviews.

Questions about this decision

If you wish to discuss this decision, please contact Siobhan, the Freedom of Information case manager, by phone on (02) 6141 6666 or by email foi@ag.gov.au.

Yours sincerely

Susan Robertson

Assistant Secretary

FOI

Australian Government

Department of the Prime Minister and Cabinet

ONE NATIONAL CIRCUIT
BARTON

FOI/2015/166

FREEDOM OF INFORMATION ACT 1982

REQUEST BY: **Mr Geoff Teague**

DECISION BY: **Mr Peter Arnaudo**
Assistant Secretary
Honours, Symbols and Legal Policy Branch

The FOI request

In an email dated 23 August 2015 the applicant made a request to the Department of the Prime Minister and Cabinet under the *Freedom of Information Act 1982* (the FOI Act) in the following terms:

> I require a statement of information from your department that I believe is responsible for this request. This is a request arising from notices made apparent to me with regard to claimed authorities of public government. With particularity, I take notice of the currency available and the depiction of the face of the Queen on the Australian five dollar note.
>
> Having due notice that the Queen is the authority by which commissions are issued and laws are proclaimed and assented, it is my understanding that the Australian Royal Style and Titles Act 1973 provides for this office, "Elizabeth the Second, by the Grace of God, Queen of Australia and Her other Realms and Territories, Head of the Commonwealth."
>
> Request
> I request so that it may be known, the instrument of authority that the Australian Royal Style and Titles Act 1973 looks to as a head of power to be valid law within the Commonwealth of Australia, that would normally be found in section 51 of the Australian Constitution Act. If the instrument cannot be found within section 51 of the Australian Constitution Act, please state the reason why and please provide for where else it may be found.

Authorised decision-maker

I am authorised to make this decision in accordance with arrangements approved by the Department's Secretary under section 23 of the FOI Act.

Decision

I have decided to refuse the request under section 12(1)(a) and section 24A(1)(b)(ii) of the FOI Act. My reasons for decision appear below.

Reasons for decision

Section 12(1)(a)

Section 12(1)(a) of the FOI Act provides that a person is not entitled to obtain access under the FOI Act to a document, or a copy of a document, which is, under the *Archives Act 1983* (the Archives Act), within the open access period within the meaning of that Act unless the document contains personal information (including personal information about a deceased person).

The applicant has sought access to 'the instrument of authority that the Australian Royal Style and Titles Act 1973 looks to as a head of power to be valid law within the Commonwealth of Australia, that would normally be found in section 51 of the Australian Constitution Act.' The *Royal Style and Titles Act 1973* (the Royal Style and Titles Act) received Royal assent on 19 October 1973. I consider that if the document sought by the applicant exists, it would have come into existence before the Royal Style and Titles Act received Royal assent. Section 3(7) of the Archives Act provides that records that came into existence in a year ending before 31 December 1980 are in the open access period on and after 1 January in the year that is 31 years after the creation year. Taking the year in which the Royal Style and Titles Act received Royal assent as the year in which it was created, the document sought by the applicant, if it exists, would have come into existence no later than 1973. For the purposes of the open access period under the Archives Act this means that the document sought by the applicant would have come into the open access period on 1 January 2004.

Accordingly, I am satisfied that the document sought by the applicant, if it exists, would be in the open access period under the Archives Act and therefore the applicant has no right of access under the FOI Act to that document.

Section 24A(1)(b)(ii)

Section 24A(1) of the FOI Act provides that:

> An agency or Minister may refuse a request for access to a document if:
> (a) all reasonable steps have been taken to find the document; and
> (b) the agency or Minister is satisfied that the document:
> (i) is in the agency's or Minister's possession but cannot be found; or
> (ii) does not exist.

The applicant has sought access to 'the instrument of authority that the Australian Royal Style and Titles Act 1973 looks to as a head of power to be valid law within the Commonwealth of Australia, that would normally be found in section 51 of the Australian Constitution Act.'
I note the Department has a record of responding to at least three prior FOI requests for the same document made by different applicants. Each prior request was refused on the ground that the Department had undertaken all reasonable steps to find the document sought, but no document was found in the Department's possession. In each case, the steps undertaken were

a search for files that might contain the document relevant to the request and, where a file was identified that might contain the relevant document, a search of that file.

As no relevant documents were identified in those prior searches, I would not expect the Department to have come into possession of any document meeting the terms of the applicant's request in the period since those prior searches were completed. In these circumstances, I do not think it reasonable to cause further searches to be undertaken in relation to the applicant's request.

I am therefore satisfied that all reasonable steps have been taken to find the document meeting the terms of the applicant's request, but no such document exists, and I refuse the request under section 24A(1)(b)(ii) of the FOI Act accordingly.

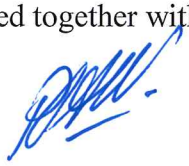
Should it assist the applicant, more information about the Royal Style and Titles Act is available on the web site www.foundingdocs.gov.au. The web site includes a scanned copy of the Royal Style and Titles Act featuring the assent by Queen Elizabeth II shown by her signature on the cover.

Processing and access charges

I have decided not to impose a charge for this request.

Review and complaint rights

I understand that information about the applicant's rights of review and complaint will be provided together with this decision.



Peter Arnaudo
Assistant Secretary
Honours, Symbols and Legal Policy Branch

28 August 2015

Australian Government
Office of the Australian Information Commissioner

FOI fact sheet 12

Freedom of information – Your review rights

July 2012

If you disagree with the decision of an Australian Government agency or minister under the *Freedom of Information Act 1982* (the FOI Act), you can ask for the decision to be reviewed. You may want to seek review if you sought certain documents and were not given full access, if someone is to be granted access to information that is about you, if the agency has informed you that it will impose a charge for processing your request or if your application to have your personal information amended was not accepted. There are two ways you can ask for review of a decision: internal review by the agency, and external review by the Australian Information Commissioner.

Internal review

If an agency makes an FOI decision that you disagree with, you can ask the agency to review its decision. The review will be carried out by a different agency officer, usually someone at a more senior level. There is no charge for internal review.

You must apply within 30 days of being notified of the decision, unless the agency extended the application time. You should contact the agency if you wish to seek an extension. The agency must make a review decision within 30 days. If it does not do so, its original decision is considered to be affirmed.

Internal review is not available if a minister or the chief officer of the agency made the decision personally.

Review by the Information Commissioner

The Information Commissioner is an independent office holder who can review the decisions of agencies and ministers under the FOI Act.

Is a review the same as a complaint?

No. The Information Commissioner also investigates complaints about agency actions under the FOI Act. However, if you are complaining that an agency decision is wrong, it will be treated as an application for a review. Your matter will be treated as a complaint when a review would not be practical or would not address your concerns (for example, if you were not consulted about a document that contains your personal information before it was released). For more information see FOI fact sheet 13 – *Freedom of information: How to make a complaint.*

Do I have to go through the agency's internal review process first?

No. You may apply directly to the Information Commissioner. However, going through the agency's internal review process gives the agency the opportunity to reconsider its initial decision, and your needs may be met more quickly without undergoing an external review process.

Do I have to pay?

No. The Information Commissioner's review is free.

How do I apply?

You must apply in writing and you can lodge your application in one of the following ways:

online:	www.oaic.gov.au
post:	GPO Box 2999, Canberra ACT 2601
fax:	+61 2 9284 9666
email:	enquiries@oaic.gov.au
in person:	Level 8, Piccadilly Tower 133 Castlereagh Street Sydney NSW

An application form is available on the website at www.oaic.gov.au. Your application should include a copy of the notice of the decision that you are objecting to (if one was provided), and your contact details. You should also set out why you are objecting to the decision.

Can I get help in completing the application?

Yes. The Information Commissioner's staff are available to help you with your application if anything is unclear.

When do I have to apply?

If you are objecting to a decision to refuse access to documents, impose a charge or refuse to amend a document, you must apply to the Information Commissioner within 60 days of being given notice of the decision. If you are objecting to a decision to grant access to another person, you must apply within 30 days of being notified of that decision.

You can ask the Information Commissioner for an extension of time to apply, and this may be granted if the Information Commissioner considers it is reasonable in the circumstances.

Who will conduct the review?

Staff of the Information Commissioner will conduct the review. Only the Information Commissioner, the FOI Commissioner or the Privacy Commissioner can make a decision at the end of the review.

Does the Information Commissioner have to review my matter?

No. The Information Commissioner may decide not to review an application that is frivolous, misconceived or lacking in substance, or if you fail to cooperate with the process or cannot be contacted after reasonable attempts. You cannot appeal against that decision.

Alternatively the Information Commissioner may decide that the Administrative Appeals Tribunal (AAT) would be better placed to review the matter, and if so, will advise you of the procedure for applying to the AAT. This will not be common.

Can I withdraw my application?

Yes. An application can be withdrawn at any time before the Information Commissioner makes a decision.

What happens in the review process?

The review process is designed to be as informal as possible. The Information Commissioner may contact you or any of the other parties to clarify matters and seek more information. The Information Commissioner may also ask the agency or minister to provide reasons for their decision if the reasons given were inadequate.

Most reviews will be made on the basis of the submissions and papers provided by the parties. Sometimes the Information Commissioner may decide to hold a hearing if one of the parties applies. Parties may participate in a hearing by telephone. If confidential matters are raised, the hearing may be held partly or wholly in private.

Will there be other parties to the review?

There may be. The Information Commissioner can join other parties who are affected by the application. For example, if you are objecting to someone else being granted access to information that concerns you, that person may be joined in the review.

Can someone else represent me?

Yes, including a lawyer. However, the Information Commissioner prefers the process to be as informal and cost-effective as possible and does not encourage legal representation.

Will the Information Commissioner look at all documents, including ones that are claimed to be exempt?

Yes. The Information Commissioner's review is a fresh decision, so all the relevant material must be examined, including documents that the agency or minister has declined to release. Developments that have occurred since the original decision may also be considered.

What powers does the Information Commissioner have?

While the review process is designed to be informal, the Information Commissioner has formal powers to require anyone to produce information or documents, to compel anyone to attend to answer questions and to take an oath or affirmation that their answers will be true.

An agency or minister can also be ordered to undertake further searches for documents.

What decisions can the Information Commissioner make?

After reviewing a decision, the Information Commissioner must do one of three things:

- set the decision aside and make a fresh decision
- affirm the decision, or
- vary the decision.

The Information Commissioner will give reasons for the decision.

Will the decision be made public?

Yes. The Information Commissioner will publish decisions on the website. Exempt material (that is, material that is not released) will not be included. Nor will the name of the review applicant, unless that person requests otherwise or there is a special reason to publish it.

What can I do if I disagree with the Information Commissioner's review decision?

You can appeal to the AAT. The Information Commissioner will not be a party to those proceedings. There is a fee for lodging an AAT application, although there are exemptions for health care and pension concession card holders, and the AAT can waive the fee on financial hardship grounds. For further information see www.aat.gov.au/FormsAndFees/Fees.htm.

FOI applications made before 1 November 2010

The Information Commissioner can only review an agency's or minister's FOI decision if you made your FOI request on or after 1 November 2010. If you made your FOI request before 1 November, even if the decision was made after that date, the review process is different.

You must first ask the agency for internal review of the decision. You may then appeal to the AAT if you are not satisfied with the decision.

The information provided in this fact sheet is of a general nature. It is not a substitute for legal advice.

For further information

telephone: 1300 363 992
email: enquiries@oaic.gov.au
write: GPO Box 2999, Canberra ACT 2601
or visit our website at **www.oaic.gov.au**

Australian Government
Office of the Australian Information Commissioner

FOI Fact Sheet 13

Freedom of information – How to make a complaint

October 2010

You may complain to the Australian Information Commissioner if you have concerns about how an Australian Government agency handled a request for documents under the *Freedom of Information Act 1982* (the FOI Act) or took any other action under that Act. If you are unhappy with the agency's decision about giving or refusing access to documents, you should ask for the decision to be reviewed, which is a separate process.

Disagree with an FOI decision?

If you disagree with an agency's or minister's decision on your request under the FOI Act, you have the right to have the decision reviewed. You can ask an agency to review its decision internally. You also have the right to ask the Information Commissioner to review an agency's or minister's decision. See **FOI Fact Sheet 12 Freedom of information – Your review rights** for more information about the review process.

If you are concerned about the way an agency has handled your matter, you can complain to the Information Commissioner.

What are the powers of the Information Commissioner?

The Information Commissioner can investigate a complaint about how an agency handled an FOI request, or other actions the agency took under the FOI Act. The Information Commissioner cannot investigate a complaint about a minister.

In conducting the investigation the Information Commissioner has the power to:

- make inquiries of an agency
- obtain information from any person
- take possession of, or inspect, any relevant documents.

If the Information Commissioner decides to investigate your complaint, the agency you have complained about will be notified in writing of the complaint. The Information Commissioner conducts investigations of complaints in private.

Who can make a complaint?

Any person can make a complaint about the actions of an agency in relation to an FOI activity. You do not need to have requested documents under the FOI Act.

When should I make a complaint?

You can complain to the Information Commissioner at any time. If your complaint relates to an FOI request you can make the complaint at any stage of the process.

Before making a complaint to the Information Commissioner, you should contact the agency directly to try to resolve your concerns. The Information Commissioner may decide not to investigate your complaint if you have not raised your concerns first with the agency or you have not given the agency a reasonable opportunity to deal with your complaint.

How do I make a complaint?

Your complaint must be in writing and must specify the agency you are complaining about. You can send your complaint to us using the details at the end of this fact sheet. A complaint form is also available on our website at www.oaic.gov.au.

If you need help we can assist you. You can contact us on 1300 363 992 or by email to enquiries@oaic.gov.au.

What information do I need to put in the complaint?

To help the Information Commissioner give the best consideration to your complaint, please provide as much relevant information as possible. Be clear about the issues in your complaint and what action or outcome you would like to see as a result.

Is there a fee for making a complaint?

No. There are no costs involved in making a complaint to the Information Commissioner.

What will happen to my complaint?

An officer of the Information Commissioner will contact you to discuss your complaint and you will be kept informed of the progress of your complaint along the way.

Before deciding whether to investigate your complaint the Information Commissioner may make preliminary inquiries of the agency you have complained about.

If the Information Commissioner decides to investigate your complaint, the Commissioner will write to the agency and request information to assist with the investigation.

Can the Information Commissioner decide not to investigate my complaint?

Yes. The Information Commissioner may decide not to investigate, or may discontinue an investigation, if:

- your complaint does not concern an agency's action under the FOI Act
- it is more appropriate for you to complain to another body (such as the agency or the Commonwealth Ombudsman)
- it is more appropriate for you to ask for the decision to be reviewed
- the agency you complained about has dealt with your complaint, or is in the process of dealing with it
- your complaint is frivolous, lacking in substance or not made in good faith
- you do not have sufficient interest in the matter.

If the Information Commissioner decides not to investigate or discontinues an investigation, the Commissioner will notify you and the agency of the reasons for this in writing.

How will my complaint be resolved?

In some cases the Information Commissioner's investigation and intervention may result in the agency addressing the issues that you have complained about. In other cases the Information Commissioner may make suggestions or recommendations that the agency should implement. You and the agency will be notified in writing of the outcome of the investigation.

If an agency fails to take adequate and appropriate action to implement any recommendations, the Information Commissioner may issue a formal implementation notice. This notice requires the agency to explain what action it will take to implement the recommendations. The Information Commissioner may also provide a written report to the minister responsible for the agency, and the report will be tabled in Parliament.

Your name will not be included in the report unless there is a special reason and you were first consulted.

Investigation by the Ombudsman

The Commonwealth Ombudsman can also investigate complaints about action taken by agencies under the FOI Act. However, if the issue complained about either could be or has been investigated by the Information Commissioner, the Ombudsman will consult the Information Commissioner to avoid the same matter being investigated twice. If the Ombudsman decides not to investigate, the complaint and all relevant documents must be transferred to the Information Commissioner.

The Information Commissioner can also transfer to the Ombudsman a complaint that could more appropriately be investigated by the Ombudsman. This could occur where the FOI complaint is only one part of a wider grievance about an agency's actions. It is unlikely that this will be common. You will be notified in writing if your complaint is transferred.

The information provided in this fact sheet is of a general nature. It is not a substitute for legal advice.

For further information

telephone: 1300 363 992
email: enquiries@oaic.gov.au
write: GPO Box 2999, Canberra ACT 2601
or visit our website at
www.oaic.gov.au

[2021] FWCFB 6015

FAIR WORK COMMISSION

DECISION

Fair Work Act 2009

s.604 - Appeal of decisions

Jennifer Kimber

v

Sapphire Coast Community Aged Care Ltd

(C2021/2676)

VICE PRESIDENT HATCHER

DEPUTY PRESIDENT DEAN

COMMISSIONER RIORDAN

SYDNEY, 27 SEPTEMBER 2021

Appeal against decision [2021] FWC 1818 of Commissioner McKenna at Sydney on 29 April 2021 in matter number U2020/9867.

DECISION OF VICE PRESIDENT HATCHER AND COMMISSIONER RIORDAN

Introduction

[1] Ms Jennifer Kimber has lodged an appeal pursuant to s 604 of the Fair Work Act 2009 (FW Act), for which permission to appeal is required, against a decision of Commissioner McKenna issued on 29 April 2021 1 (decision) in which she dismissed Ms Kimber's application for an unfair dismissal remedy against Sapphire Coast Community Aged Care Ltd (Sapphire). Sapphire operates aged care facilities in New South Wales, including at Imlay House in Pambula. Ms Kimber was, until her dismissal on 6 July 2020, employed as a receptionist at Imlay House. Her dismissal arose from her refusal to comply with a requirement to be vaccinated against influenza. In the decision, the Commissioner determined that the dismissal was for a valid reason, was procedurally fair, and was

not harsh, unjust or unreasonable. Ms Kimber contends in her appeal that the grant of permission to appeal would be in the public interest and that the decision was attended by appealable error.

Parts 2 – 100 – Removed

PART 2 –VACCINE REQUIREMENTS IN RELATION TO COVID

[101] The Majority Decision raises the issue of COVID vaccinations and their requirement in workplaces. It forms part of the reasoning for refusing to grant permission to appeal and accordingly provides the opportunity in this decision to deal with this important issue.

[102] There can be absolutely no doubt that vaccines are a highly effective tool for protection against a variety of diseases. The focus of this decision, however, is not the pros and cons of vaccination. It is about the extent to which mandatory COVID vaccinations can be justified, as to do so impinges on other laws, liberties and rights that exist in Australia.

Vaccinations should be voluntary

[103] It has been widely accepted that for the overwhelming majority of Australians, vaccination should be voluntary.

[104] The commonly accepted definition of voluntary includes acting of one's own free will, optional or non-compulsory. This is the opposite of the definition of mandatory, which is something that is compulsory, obligatory or required. Something that is mandatory must be done.

[105] The stated position of the Australian Government is that the vaccine is voluntary. On 21 July 2021, the Prime Minister in a media conference stated that "people make their own decisions about their own health and their own bodies. That's why we don't have mandatory vaccination in relation to the general population".

[106] On 13 August 2021, the Australian Council of Trade Unions (ACTU) and the Business Council of Australia (BCA) issued a joint statement on mandatory COVID vaccinations in which it acknowledged the Australian Government's COVID vaccination policy that the vaccine is voluntary, and confirmed the views of the BCA and ACTU that "for the overwhelming majority of Australians, your work or workplace should not fundamentally alter the voluntary nature of vaccination". (emphasis added)

[107] The Fair Work Ombudsman has publicly stated that employers will need to have a "compelling reason" before requiring vaccinations, and that "the overwhelming majority of employers should assume that they can't require their employees to be vaccinated against coronavirus". (emphasis added)

[108] Safe Work Australia has publicly stated that "most employers will not need to make vaccinations mandatory to meet their [health and safety] obligations". (emphasis added)

[109] Despite this, many employers are declaring they will mandate COVID vaccines for their workers, and PHOs are being made by State Governments, in circumstances where there is no justification for doing so.

Mandatory vaccination cannot be justified

[110] COVID vaccinations, in accordance with the Australian Government's policy, must be freely available and voluntary for all Australians.

[111] Mandatory COVID vaccinations, however, cannot be justified in almost every workplace in Australia. While there are numerous reasons for this, this decision will focus on:

a) the requirement for freely given and informed consent for medical procedures;

b) denying an unvaccinated person the ability work on health and safety grounds, whether at the initiation of an employer or as part of a PHO; and

c) the requirements to comply with disability discrimination laws.

[112] There is of course a degree of overlap with the reasoning applicable to the inability to justify mandatory vaccination whether at the initiative of employers or as part of a PHO, however I have not repeated the reasons under each separate heading.

[113] Before turning to a consideration of these reasons, it is important to set the context with some information that is publicly available and should be uncontroversial:

a. Unlike many other vaccinations such as those used to stop the spread of tetanus, yellow fever and smallpox, COVID vaccinations are not designed to stop COVID. They are designed to reduce the symptoms of the virus, however a fully vaccinated person can contract and transmit COVID.

b. The science is clear in that COVID is less serious for those who are young and otherwise healthy compared to those who are elderly and/or who have co-morbidities. In other words, the risk of COVID is far greater for those who are elderly or have co-morbidities. Around 87% of those who have died with COVID in Australia are over 80 years old and had other pre-existing illnesses listed on their death certificates.

c. The World Health Organisation has stated that most people diagnosed with COVID will recover without the need for any medical treatment.

d. The vaccines are only provisionally approved for use in Australia and are accordingly still part of a clinical trial 20.

e. There are side effects to the COVID vaccines that are now known. That side effects exist is not a conspiracy theory.

f. The long-term effects of the COVID vaccines are unknown, and this is recognised by the Therapeutic Goods Administration (TGA) in Australia.

Consent is required for participation in clinical trials

[114] Consent is required for all participation in a clinical trial. Consent is necessary because people have a fundamental right to bodily integrity, that being autonomy and self-determination over their own body without unconsented physical intrusion. Voluntary consent for any medical treatment has been a fundamental part of the laws of Australia and internationally for decades.

It is legally, ethically and morally wrong to coerce a person to participate in a clinical trial.

[115] Coercion is not consent. Coercion is the practice of persuading someone to do something using force or threats. Some have suggested that there is no coercion in threatening a person with dismissal and withdrawing their ability to participate in society if that person does not have the COVID vaccine. However, nothing could be further from the truth.

[116] All COVID vaccines in Australia are only provisionally approved, and as such remain part of a clinical trial 21. This is not part of a conspiracy theory. It is a fact easily verifiable from the website

of the TGA, Australia's regulatory authority responsible for assessing and registering/approving all COVID vaccines before they can be used in Australia.

[117] The requirement for consent in this context is not new and should never be controversial. The Nuremburg Code (the Code), formulated in 1947 in response to Nazi doctors performing medical experiments on people during WWII, is one of the most important documents in the history of the ethics of medical research.

[118] The first principle of the Code is that "The voluntary consent of the human subject is absolutely essential". The Code goes on to say that "This means that the person involved should have legal capacity to give consent; should be so situated as to be able to exercise free power of choice, without the intervention of any element of force, fraud, deceit, duress, overreaching, or other ulterior form of constraint or coercion; and should have sufficient knowledge and comprehension of the elements of the subject matter involved as to enable him to make an understanding and enlightened decision…."

[119] Informed and freely given consent is at the heart of the Code and is rightly viewed as a protection of a person's human rights.

[120] The United Nations, including through the Universal Declaration of Human Rights, first proclaimed in 1948, has long recognised the right to bodily integrity.

[121] The Declaration of Helsinki (the Declaration), made in 1964 by the World Medical Association, is also a statement of ethical principles for medical research involving human subjects. Under the heading of "Informed Consent", the Declaration starts with the acknowledgement that **"Participation by individuals capable of giving informed consent as subjects in medical research must be voluntary".**

[122] Australia is a party to the seven core international human rights treaties, including the International Covenant on Civil and Political Rights.

[123] The Australian Human Right Commission Act 1986 (Cth) gives effect to Australia's obligations under the International Covenant on Civil and Political Rights, which provides in Article 7 that "…no one shall be subjected without his free consent to medical or scientific experimentation".

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Form 7
[Rule 3.8]

COURT FILE NUMBER	2110 00751
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	RED DEER
APPLICANT	DEENA HINSHAW
RESPONDENT	PATRICK JAMES KING
DOCUMENT	**ORIGINATING APPLICATION**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	ALBERTA JUSTICE CIVIL LITIGATION #1710 639 5th Avenue SW Calgary, Alberta T2P 0M9 TELEPHONE: 403-297-2001 FACSIMILE: 403-662-3824 Cynthia R. Hykaway OUR FILE: LIT- 11840

Clerk's Stamp

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NOTICE TO THE RESPONDENT(S)

This application is made against you. You are a respondent.

You have the right to state your side of this matter before the Court.

To do so, you must be in Court when the application is heard as shown below:

Date:	July 19, 2021 ~~(alternate date July 20, 2021~~)
Time:	10:00 a.m.
Where:	Red Deer Courthouse, 4909 48th Avenue, Red Deer, Alberta
Before:	Justice in Chambers

Go to the end of this document to see what you can do and when you must do it.

Basis for this claim:

1. The Applicant, Dr. Deena Hinshaw, is the Chief Medical Officer of Health for Alberta ("**CMOH**").

2. Part 3 of the *Public Health Act*, RSA 2000, c. P-37 (the "**Act**") authorizes the CMOH to issue orders to protect public health. In response to the COVID-19 pandemic, the CMOH has issued orders under Part 3 of the Act.

3. Under s. 73 of the Act, a person who contravenes an order issued under Part 3 is guilty of an offence.

4. On December 5, 2020, the Respondent, Patrick James King ("**Mr. King**"), was issued a ticket for contravening an order of the CMOH contrary to s. 73(1) of the Act (the "**ticket**"). The trial is being heard by the Honourable Judge Snider in Provincial Court action number A87988036R (the "**Provincial Court proceeding**").

5. On July 14, 2021, Mr. King obtained a subpoena for the CMOH to give evidence in the Provincial Court proceeding (the "**subpoena**"), and served the subpoena on the CMOH on July 15, 2021. The subpoena requires the CMOH to attend a trial continuation in the Provincial Court proceeding on July 21, 2021.

6. The subpoena was issued by a Justice of the Peace under s. 699 of the *Criminal Code*, RSC 1985, c. C-46 (the "***Criminal Code***"). It requires the CMOH to bring "all white papers describing the isolation of the COVID-19 aka SARS-CoV-2 virus in human beings, directly from a sample taken from a diseased patient", because "these white papers would have been integral in the crafting of the statutes made under the "Public Health Act" here in Alberta".

The Subpoena is Technically Deficient

7. The Justice of the Peace did not have jurisdiction to issue the subpoena under s. 34(3) of the *Alberta Evidence Act*, RSA 2000, c. A-18, and it should be quashed on this basis.

The CMOH Has No Material Evidence

8. Mr. King has no evidence showing that the evidence sought from the CMOH is likely to be material to the Provincial Court proceeding contrary to ss. 698 and 699 of the *Criminal Code*. As such, the Justice of the Peace did not have jurisdiction to issue the subpoena, and it should be quashed on this basis.

9. Mr. King explained the reason for the subpoena in the document he attached as Schedule A to the subpoena. It is clear that Mr. King seeks evidence relating to the rationale for orders issued by the CMOH under the Act: he seeks evidence about the "crafting of the statutes".

10. The Provincial Court proceeding is about the December 5, 2020 enforcement of the law (when Mr. King was issued the ticket), not the rationale for the law. The CMOH does not have, and Mr. King does not seek from the CMOH, any evidence about the ticket issued to Mr. King on December 5, 2020.

11. Further, there can be no constitutional challenge to the Act, or orders issued by the CMOH under the Act, in the absence of proper notice to the Attorney General of Canada and the Minister of Justice and Solicitor General of Alberta under the *Judicature Act*, RSA 2000, c. J-2. Mr. King has not given any such notice in the Provincial Court proceeding.

Remedy sought:

12. An Order quashing the subpoena.

13. An Order abridging time for service.

14. Any other direction that the Court considers appropriate in the circumstances.

Affidavit or other evidence to be used in support of this application:

15. Affidavit of K. Grech, sworn July 16, 2021.

16. Such further material as Counsel may advise and this Honourable Court may allow.

Applicable Acts and regulations:

17. *Public Health Act*, RSA 2000, c. P-37, Part 3.

18. *Criminal Code*, RSC 1985, c. C-46.

19. Alberta Evidence Act, RSA 2000, c. A-18, s. 34.

20. *Judicature Act*, RSA 2000, c. J-2, s. 24.

21. *Alberta Rules of Court*, rule 3.15.

WARNING

You are named as a respondent because you have made or are expected to make an adverse claim in respect of this originating application. If you do not come to Court either in person or by your lawyer, the Court may make an order declaring you and all persons claiming under you to be barred from taking any further proceedings against the applicant(s) and against all persons claiming under the applicant(s). You will be bound by any order the Court makes, or another order might be given or other proceedings taken which the applicant(s) is/are entitled to make without any further notice to you. If you want to take part in the application, you or your lawyer must attend in Court on the date and at the time shown at the beginning of this form. If you intend to rely on an affidavit or other evidence when the originating application is heard or considered, you must reply by giving reasonable notice of that material to the applicant(s).