

## Notice of Decision and Reasons for Decision

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Applicant: AA3  
Agency: Northern Health  
Decision Date: 7 March 2019  
Exemptions considered: Sections 33(1) and 35(1)(b)

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FREEDOM OF INFORMATION – Medical records – personal affairs information – communicated in confidence – contrary to the public interest

All references to legislation in this document are to the *Freedom of Information Act 1982* (Vic) (**FOI Act**) unless otherwise stated.

### Notice of Decision

I have conducted a review under section 49F of the Agency's decision to refuse access to documents requested by the Applicant under the FOI Act.

My decision on the Applicant's request is the same as the Agency's decision in that I have decided to release the documents in part to the Applicant.

The Schedule of Documents in **Annexure 1** sets out my decision in relation to each document.

My reasons for decision follow.

**Joanne Kummrow**  
Acting Public Access Deputy Commissioner

7 March 2019

## **Reasons for Decision**

### **Background to review**

1. The Applicant made a request to the Agency for access to [their] medical file.
2. In its decision, the Agency identified three documents falling within the terms of the Applicant's request. It decided to grant access to one document in full and two documents in part.

### **Review**

3. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
4. I have examined copies of the documents subject to review.
5. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
6. I have considered all communications and submissions received from the parties, including:
  - (a) the Agency's decision on the FOI request;
  - (b) the Applicant's submission received on 1 February 2019 and information provided with the Applicant's review application; and
  - (c) all communications between OVIC and the Agency and the Applicant.
7. In undertaking my review, I have had regard to the object of the FOI Act, which is to create a general right of access to information in the possession of the Government or other public bodies, limited only by exceptions and exemptions necessary to protect essential public interests, privacy and business affairs.

### **Review of exemptions**

8. The Agency relied on sections 33(1) and 35(1) to refuse access to the documents in part. The Agency's decision letter sets out the reasons for its decision.

### ***Section 35(1)(b)***

9. The Agency denied access to information in the documents under section 35(1)(b).
10. A document is exempt under section 35(1)(b) if two conditions are satisfied:
  - (a) disclosure would divulge information or matter communicated in confidence by or on behalf of a person or a government to an agency or a Minister; and
  - (b) disclosure would be contrary to the public interest as it would be reasonably likely to impair the ability of an agency or a Minister to obtain similar information in the future.
11. The Applicant indicated in [their] submission that the exempted information may relate to [the Applicant's family member]. Having viewed the documents in full I confirm, for the Applicant's benefit, the information does not relate to [the Applicant's family member] or [a family member's] medical treatment.

12. The information exempted in the documents by the Agency is information provided by a third party to the Agency.
13. When determining whether information was communicated in confidence, it is necessary to consider the position from the perspective of the communicator.<sup>1</sup> Further, confidentiality can be expressed or implied from the circumstances of the matter.<sup>2</sup>
14. I am mindful in this matter that I do not have information before me regarding the views of the person who provided the information to the Agency and whether they provided the information to the Agency on a confidential basis. However, given the nature of the information and taking into account the context in which it was provided, I consider it is reasonable to assume the person who provided this information to the Agency did so, with the understanding that the information provided would remain confidential.
15. Accordingly, I am satisfied disclosure of the document would divulge information communicated in confidence to the Agency.
16. However, the fact the information was communicated in confidence is not the only consideration. Section 35(1)(b) also requires that I consider whether the Agency would be impaired from obtaining similar information in the future if the information were to be disclosed under the FOI Act.
17. This means, I must be satisfied that, if the information were to be disclosed, others in the position of the communicator would be reasonably likely not to provide similar information to the Agency in the future.
18. I consider there is an essential public interest in individuals being able to provide what is often sensitive and confidential information about a patient to medical staff in a public health service agency. In turn, I consider medical staff rely on this information to assist the medical treatment of patients under their care.
19. In relation to this case, I accept that if individuals, who provide information to the Agency about a patient in the Agency's care were aware their identity and the information they provide would be disclosed in response to an FOI request, they would be less likely to communicate similar information to the Agency in the future. I am of the view that if individuals are unable to speak freely and provide information to medical and other hospital staff, the appropriateness and quality of care that is provided to patients may suffer as a result. I consider this to be a significant and detrimental outcome for the Agency and similar health providers who, at times, rely on information being provided from a number of sources to effectively diagnose and safely treat patients in the future. It would also be contrary to the interests of patients in receipt of medical treatment and other health services.
20. For these reasons, I am satisfied the information in the document is exempt under section 35(1)(b).

### **Section 33(1)**

21. A document is exempt under section 33(1) if two conditions are satisfied:
  - (a) disclosure of the document under the FOI Act would 'involve' the disclosure of information relating to the 'personal affairs' of a person other than the Applicant;<sup>3</sup> and
  - (b) such disclosure would be 'unreasonable'.

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<sup>1</sup> *XYZ v Victoria Police* [2010] VCAT 255 at [265].

<sup>2</sup> *Ibid.*

<sup>3</sup> Sections 33(1) and (2).

22. Information relating to a person's 'personal affairs' includes information that identifies any person, or discloses their address or location. It also includes any information from which this may be reasonably determined.<sup>4</sup>
23. The concept of 'unreasonable disclosure' involves balancing the public interest in the disclosure of official information with the personal interest in privacy in the particular circumstances of a matter.
24. The information considered exempt under 33(1) are the direct telephone numbers and email addresses of third parties. I am satisfied the exempted information is personal affairs information of individuals who are not the Applicant. Therefore, I must consider whether disclosure of the personal affairs information of third parties to the Applicant would be unreasonable in the circumstances.
25. The following matters are relevant to the question of whether the exempt information is unreasonable to release in this instance:
- (a) the nature of the personal affairs information (for example, whether it is sensitive or its current relevance);
  - (b) the applicant's reason and motives for seeking the information;
  - (c) whether the applicant's purpose for seeking access is likely to be achieved by releasing the information;
  - (d) whether any public interest would be promoted by release of the information;
  - (e) the extent to which the information is already publicly available; and
  - (f) whether the individuals to whom the information relates object, or would be likely to object to the release of the information.
26. I appreciate the Applicant's interest in obtaining a copy of [their] medical file. I also acknowledge [they] would wish for a complete copy of documents without any redactions to any pages. I acknowledge that redactions made to documents can create a sense of disappointment and frustration to applicants, regardless of whether only a small amount of material is withheld.
27. I do not have information before me regarding the attitudes of the third parties whose personal affairs information was exempted. However, I consider it more likely than not, those individuals would object to the release of their information to the Applicant in the circumstances.
28. The information withheld does not appear to be publicly available. I consider the Applicant's interest in the information would serve a personal interest only. I do not consider there is a broader public interest promoted by releasing the personal information of third parties in this instance. Rather, I consider there is a strong public interest in the Agency preserving the privacy of individuals in similar circumstances.
29. I am obliged to consider whether release of any information would be reasonably likely to endanger the life or physical safety of any person.<sup>5</sup>
30. There is no evidence before me to suggest that release would be likely to endanger the physical safety of the third parties whose information appear in the document. However, having consider the context and purpose for which the personal affairs information was provided, I consider there is a

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<sup>4</sup> Section 33(9).

<sup>5</sup> Section 33(2A).

possibility that release of the information may cause a degree of stress and anxiety to the third parties.

31. For these reasons, I am satisfied release of the personal affairs information exempted by the Agency would be unreasonable and the information is therefore exempt under section 33(1).

#### ***Deletion of exempt or irrelevant information***

32. Section 25 requires an agency to grant access to an edited copy of a document when it is practicable for the agency or Minister to delete exempt or irrelevant information and the applicant agrees to receiving such a copy.
33. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'<sup>6</sup> and the effectiveness of the deletions. Where deletions would render the document meaningless they are not 'practicable' and release of the document is not required in accordance with section 25.<sup>7</sup>
34. I have considered the effect of deleting exempt information from the documents. In my view, it is practicable for the Agency to delete the exempt information as it would not require substantial time and effort, and the edited documents would retain meaning.

#### ***Conclusion***

35. On the information available, I am satisfied the exemptions in sections 33(1) and 35(1)(b) apply to the documents. My decision is the same as the Agency's decision in that I have decided to grant access to the documents in part.

#### ***Review rights***

36. If either party to this review is not satisfied with my decision, they are entitled to apply to the Victorian Civil and Administrative Tribunal (**VCAT**) for it to be reviewed.<sup>8</sup>
37. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.<sup>9</sup>
38. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.<sup>10</sup>
39. Information about how to apply to VCAT is available online at [www.vcat.vic.gov.au](http://www.vcat.vic.gov.au). Alternatively, VCAT may be contacted by email at [admin@vcat.vic.gov.au](mailto:admin@vcat.vic.gov.au) or by telephone on 1300 018 228.
40. The Agency is required to notify the Information Commissioner in writing as soon as practicable if either party applies to VCAT for a review of my decision.<sup>11</sup>

#### ***When this decision takes effect***

41. My decision does not take effect until the relevant review period (stated above) expires, or if either party applies to VCAT for a review, until the VCAT proceeding is concluded.

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<sup>6</sup> *Mickelborough v Victoria Police (General)* [2009] VCAT 2786 [31]; *The Herald and Weekly Times Pty Limited v The Office of the Premier (General)* [2012] VCAT 967 [82].

<sup>7</sup> *Honeywood v Department of Human Services* [2006] VCAT 2048 [26]; *RFJ v Victoria Police FOI Division (Review and Regulation)* [2013] VCAT 1267 [140], [155].

<sup>8</sup> The Applicant in section 50(1)(b) and the Agency in section 50(3D).

<sup>9</sup> Section 52(5).

<sup>10</sup> Section 52(9).

<sup>11</sup> Sections 50(3F) and (3FA).

## Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	Agency's Decision	OVIC Decision	OVIC Comments
1.	Various	North West Area Mental Health Service  Progress Notes	Released in part  Section 35(1)(b)	Release in part  Section 35(1)(b)	I am satisfied the information provided by a third party to medical staff at the Agency was communicated in confidence and release of the information that records the confidential material is contrary to the public interest as it would likely impair the Agency to obtain similar information in the future. Accordingly, this information is exempt under section 35(1)(b).
2.	Various	North West Area Mental Health Service  Correspondence	Released in part  Section 33(1)	Release in part  Section 33(1)	I consider it is unreasonable to release the direct email and telephone numbers of the third parties. Accordingly, this information is exempt under section 33(1).
3.	Various	Northern Acute Service file	Released in full	Not subject to review	