

## Notice of Decision and Reasons for Decision

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Applicant: AB6  
Agency: St Vincent's Health  
Decision Date: 26 March 2019  
Exemptions considered: Section 35(1)(b)

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FREEDOM OF INFORMATION – health related matters – medical records – community episode – screening register detail – progress notes – discharge summary – documents containing material obtained in confidence

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 the documents subject to review are exempt from release.

My reasons for decision follow.

Joanne Kummrow  
**Acting Public Access Deputy Commissioner**

26 March 2019

## Reasons for Decision

### Background to review

1. The Applicant made a request to the Agency for access to [their] health records.
2. In its decision, the Agency identified documents falling within the terms of the Applicant's request. It decided to release 176 pages of documents to the applicant, and to deny access to seven documents.

### 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 received from the parties, including:
  - (a) the Agency's decision on the FOI request; and
  - (b) the Applicant's review application.
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 the exemption in section 35(1)(b) to refuse access to parts of the documents. The Agency's decision letter sets out the reasons for its decision.

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

9. 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.
10. 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 express or implied from the circumstances of the matter.<sup>2</sup>
11. The information considered exempt in each of the documents is information provided by a third party.

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

<sup>2</sup> *Ibid*

12. I am mindful that, in this particular matter, I do not have specific information regarding whether the people who provided the information did so on a confidential basis. However, I consider the third parties would more likely than not advise the information was communicated in confidence to the Agency if consulted.
13. I am therefore satisfied that, in each document, the information was provided to the Agency in confidence. This view takes into account the sensitivity of the information and the circumstances in which it was provided. However, the fact the information has been communicated confidently is not the only consideration in relation to the exemption in section 35(1)(b).
14. The exemption also requires that I consider whether the Agency would be impaired from obtaining similar information in the future if the information is disclosed under the FOI Act. This means I must consider whether, should the information be disclosed, others in the position of the communicators would be reasonably likely to be inhibited in providing similar information to hospital staff.
15. There is a fundamental interest in individuals being able to provide what is often sensitive information about a person to medical staff. Where this occurs, members of the public need to feel confident that the information recorded by medical staff in a patient's medical records, including the identity of the person providing the information, will be held in confidence by the Agency.<sup>3</sup> If individuals are unable to speak frankly and provide information to medical and other hospital staff, the appropriateness and quality of clinical care provided to patients or vulnerable members of the public may be detrimentally affected. Information provided by third parties to medical staff is particularly critical in cases where mental health concerns are raised.
16. On the other hand, I acknowledge the Applicant has a genuine interest in obtaining the information as it relates to her health care.
17. However, in weighing these two competing priorities, I have determined the need to protect information provided in confidence provided by third parties to health services is paramount in this instance.
18. I accept the release of the information would likely result in members of the public being less forthcoming with health care services, which in turn may undermine the ability of the Agency, and similar health service providers, to effectively and safely diagnose and treat patients.
19. I am therefore satisfied release of this information would impair the Agency's ability to obtain the same or similar information in the future.

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

20. 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.
21. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'<sup>4</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 under section 25.<sup>5</sup>

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<sup>3</sup> See *Maki v Alfred Hospital*, unreported, VCAT, Davis M, 19 April 2002.

<sup>4</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>5</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].

22. I have considered the effect of deleting exempt information from the documents. In my view, it is not practicable for the Agency to delete the exempt information, because deleting the exempt information would render the documents meaningless.

### **Conclusion**

23. On the information available, I am satisfied the exemptions in section 35(1)(b) apply to the documents subject to review. I have therefore decided not to grant access to the documents.

### **Review rights**

24. 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>6</sup>
25. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.<sup>7</sup>
26. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.<sup>8</sup>
27. 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.
28. 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>9</sup>

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

29. 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> The Applicant in section 50(1)(b) and the Agency in section 50(3D).

<sup>7</sup> Section 52(5).

<sup>8</sup> Section 52(9).

<sup>9</sup> Sections 50(3F) and (3FA).

## Annexure 1

Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision
1.	[Date]	Screening register detail – pages 35 and 36	2	Refused in full Section 35(1)(b)	Refuse in full Section 35(1)(b)
2.	[Date]	Screening register detail – page 38	1	Refused in full Section 35(1)(b)	Refuse in full Section 35(1)(b)
3.	[Date]	CMHPN CATS progress notes – page 42	1	Refused in full Section 35(1)(b)	Refuse in full Section 35(1)(b)
4.	{Date}	CMHPN CATS progress notes – page 42	1	Refused in full Section 35(1)(b)	Refuse in full Section 35(1)(b)
5.	[Date]	Mental health discharge summary – reason for referral and treatment and progress in hospital – pages 53 and 54	2	Refused in full Section 35(1)(b)	Refuse in full Section 35(1)(b)
6.	[Date]	Emergency department eRecord – page 60	1	Refused in full Section 35(1)(b)	Refuse in full Section 35(1)(b)
7.	[Date]	Emergency department eRecord – page 72	1	Refused in full Section 35(1)(b)	Refuse in full Section 35(1)(b)