

Notice of Decision and Reasons for Decision

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| Applicant: | 'AD7' |
| Agency: | Barwon Health |
| Decision Date: | 23 May 2019 |
| Exemptions considered: | Sections 33(1), 35(1)(b) |
| Citation: | 'AD7' and Barwon Health (<i>Freedom of Information</i>) [2019] VICmr 34 (23 May 2019) |

FREEDOM OF INFORMATION – Applicant's medical records – documents affecting personal privacy of third parties – documents containing material obtained in confidence from third parties.

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 document in part.

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner

23 May 2019

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency for access to a part of [their] health record, namely, the progress notes on file for the period January 2019.
2. In its decision, the Agency identified 44 pages falling within the terms of the Applicant's request and decided to grant access to the 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 to exempt information in documents.
4. I have examined copies of documents subject of 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, dated 1 March 2019;
 - (a) the Applicant's review application and subsequent discussion with this office; and
 - (b) the Agency's submission dated 1 May 2019.
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 exemptions in sections 33(1) and 35(1)(b) to refuse access to parts of the documents. The Agency's decision letter sets out the reasons for its decision.

Section 33(1)

9. A document is exempt under section 33(1) if two conditions are satisfied:
 - (a) disclosure of the document under the FOI Act must involve the disclosure of information relating to the 'personal affairs' of a person; and
 - (b) such disclosure would be 'unreasonable'.
10. Section 33(9) makes it clear that information relating to the 'personal affairs' of a person includes information that identifies any person or discloses their address or location or by which this can be reasonably determined.
11. The concept of 'unreasonable disclosure' involves balancing the competing public interest in disclosure of official information, with the personal interest in privacy.

12. The following matters are particularly relevant, in the circumstances of this case:
 - (a) the nature of the personal affairs information (for example, whether it is sensitive or its current relevance);
 - (b) the extent to which the information is available to the public;
 - (c) the circumstances in which the information was obtained (for example, whether it was obtained involuntarily or in confidence);
 - (d) the Applicant's interest in the information (including their purpose for seeking access to the documents);
 - (e) whether any public interest would be promoted by release of the information;
 - (f) whether the individuals to whom the information relates object, or would be likely to object to the release of the information;
 - (g) the likelihood of further disclosure of the information, if released; and
 - (h) whether disclosure of the information would, or would be reasonably likely to, endanger the life or physical safety of any person.
13. The information the Agency decided was exempt under this section is information regarding individuals other than the Applicant.
14. I have decided information in the documents amounts to personal affairs information and disclosure of this information would be unreasonable for the following reasons:
 - (a) The personal affairs information of third parties was provided by them to the Agency with an expectation of privacy. I have formed this view given the sensitivity of the information provided and consider the parties would be likely to object to the release of such information.
 - (b) I acknowledge the Applicant's interest in this information. However, I note the documents have been carefully assessed by the Agency to release information regarding the Applicant, wherever possible.
 - (c) I am not satisfied there is an overriding public interest in the release of the personal affairs information in the documents that outweighs the personal privacy of those concerned.
 - (d) I am also required to consider section 33(2A) of the Act in determining if release of a third party's personal affairs information would be unreasonable. This provision requires that I consider whether disclosure of information would, or would be reasonably likely, to endanger the life or physical safety of any person. In my view, there are reasonable grounds to consider that concerns exist about the effect of disclosure on the safety of third parties.
15. I am satisfied the personal affairs information in the documents, as exempted by the Agency, is exempt under section 33(1).

Section 35(1)(b)

16. The Agency also applied section 35(1)(b) to the documents in part.
17. 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.
18. Whether information communicated by an individual was communicated in confidence is a question of fact.¹
19. When determining whether information was communicated in confidence, it is necessary to consider the position from the perspective of the communicator.²
20. Confidentiality can be express or implied from the circumstances of a matter.³
21. The documents form part of the Applicant's health record. They constitute progress notes written by Agency staff and relate to the Applicant and individuals other than the Applicant.
22. From my review of the documents, I am satisfied the exempt material consists of information communicated voluntarily to the Agency by third parties, and includes concerns raised by the third parties about the Applicant.
23. I have carefully considered the material in the documents, in particular, the views of the third parties who communicated the information to the Agency.
24. Given the sensitive circumstances surrounding the documents, I consider the third parties communicated the information to the Agency with an expectation that both their personal information and the information provided about the Applicant would remain confidential.
25. Accordingly, I am satisfied information in the documents was communicated to the Agency in confidence.
26. In deciding whether disclosure would be contrary to the public interest, I must consider whether disclosure of the document would be reasonably likely to impair the Agency's ability to obtain similar information in the future.
27. I accept the Agency, in its capacity as a healthcare provider, relies on information provided voluntarily by third parties to plan and provide effective treatment and care to its patients. Such information, by its nature, is generally highly personal, sensitive and confidential.
28. I acknowledge information contained in the documents is important to the Applicant and concerns [them]. However, if third parties, who provide confidential information to the Agency were aware that information would be disclosed to the patient, they would be reasonably unlikely to, or at least reluctant to, communicate similar information to the Agency in the future.
29. This would be a significant and detrimental outcome, that would impede the ability of the Agency to obtain similar information in the future and provide timely and necessary treatment or intervention.

¹ *Ryder v Booth* [1985] VR 869 at 883; *XYZ v Victoria Police* [2010] VCAT 255 at [264].

² *Ibid*, XYZ at [265].

³ *Ibid*.

30. Furthermore, section 35(1)(b) is concerned with protecting the public interest in the free flow of information between agencies and individuals upon whose information it relies. In the context of the Agency, being a hospital, the voluntary provision of sensitive information is often vital to the Agency's ability to effectively discharge its functions.
31. In *Debono v Department of Justice FOI Officer*,⁴ the Tribunal upheld the exemption under section 35(1)(b) in relation to information that was provided in confidence by third parties on the physical and psychological condition of the applicant. The Tribunal found that third parties would not make reports about the health of others if they were aware that their information may be revealed, in particular, to the patient.
32. Accordingly, I am satisfied that, in these circumstances, disclosure of the information deleted from the documents by the Agency would be contrary to the public interest, as it would likely impair the Agency's ability to obtain similar information in the future which would be a significant and detrimental outcome. I have determined that parts of the document are exempt in part under section 35(1)(b).

Conclusion

33. On the information available, I am satisfied the exemptions in sections 33(1) and 35(1)(b) apply to parts of the document that were exempt by the Agency.

Review rights

34. 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.⁵
35. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.⁶
36. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.⁷
37. Information about how to apply to VCAT is available online at www.vcat.vic.gov.au. Alternatively, VCAT may be contacted by email at admin@vcat.vic.gov.au or by telephone on 1300 018 228.
38. 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.⁸

When this decision takes effect

39. 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.

⁴ [2008] VCAT 1791

⁵ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

⁶ Section 52(5).

⁷ Section 52(9).

⁸ Sections 50(3F) and (3FA).