

Notice of Decision and Reasons for Decision

Applicant:	AB7
Agency:	St Vincent's Health
Decision Date:	28 March 2019
Exemptions considered:	Sections 33(1), 35(1)(b)
Citation:	<i>AB7 and St Vincent's Health (Freedom of Information)</i> [2019] VICmr 16 (28 March 2019)

FREEDOM OF INFORMATION – health records – third party communications – documents affecting personal privacy – 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 to refuse access to the documents.

My reasons for decision follow.

Joanne Kummrow
Acting Public Access Deputy Commissioner

28 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 dated 16 November 2018, the Agency identified certain documents falling within the terms of the Applicant's request. It decided to release 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.
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 submissions received from the parties, including:
 - (a) the Agency's decision on the FOI request dated 16 November 2018;
 - (b) the Applicant's submission dated 2 January 2019; and
 - (c) the Agency submission dated 27 March 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 deny access to 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 would 'involve' the disclosure of information relating to the 'personal affairs' of a person other than the Applicant;¹ and
 - (b) such disclosure would be 'unreasonable'.
10. 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.²
11. 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.

¹ Sections 33(1) and (2).

² Section 33(9).

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 of which information is publicly available;
 - (c) the circumstances in which the information was obtained;
 - (d) the Applicant's interest in the information, including their purpose of motive for seeking access to the documents;
 - (e) whether any public interest would be promoted by disclosure;
 - (f) the likelihood of further disclosure of the information if it is released; and
 - (g) whether the individual to whom the information related consents or objects to the disclosure.
13. I am satisfied the documents include personal affairs information, being the names and other identifying information of people other than the Applicant.
14. I have decided that disclosure would be unreasonable for the following reasons:
- (a) the nature of the personal affairs information is particularly sensitive;
 - (b) given the sensitive circumstances surrounding the documents and the nature of the information provided, I consider the information was communicated by the third parties to the Agency with an expectation of confidentiality;
 - (c) the Agency advised that some of the third parties concerned objected to the release of their personal affairs information; and
 - (d) while I acknowledge the Applicant's significant interest in obtaining the information as it relates to [their] healthcare, I must also consider the privacy of the third parties and impact that disclosure will have on the provision of healthcare services to the community.
15. I have therefore decided the personal affairs information in the documents is exempt under section 33(1).

Section 35(1)(b)

16. 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.

17. When determining whether information was communicated in confidence, it is necessary to consider the position from the perspective of the communicator.³ Further, confidentiality can be express or implied from the circumstances of the matter.⁴
18. The information considered exempt in each of the documents is information provided by a third party.
19. The Agency advised the third parties, who were able to be contacted by the Agency, did not consent to the release of the information.
20. For those parties who did not consent to the release of their information, I consider it is reasonable to infer they provided the information on a confidential basis. While I do not have specific information regarding the remaining third parties, I consider that, given the sensitivity of the information, if consulted, they would more likely than not advise the information was communicated to the Agency in confidence.
21. 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 confidentially is not the only consideration in relation to the exemption in section 35(1)(b).
22. 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.
23. 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.⁵ 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.
24. On the other hand, I acknowledge the Applicant has a genuine interest in obtaining the information as it relates to [their] health care.
25. However, in weighing these two competing priorities, I have determined the need to protect information provided in confidence by third parties to health services is paramount in this instance.
26. 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.
27. I am therefore satisfied release of this information would impair the Agency's ability to obtain the same or similar information in the future.

³ *XYZ v Victoria Police* [2010] VCAT 255 at [265]

⁴ *Ibid*

⁵ See *Maki v Alfred Hospital*, unreported, VCAT, Davis M, 19 April 2002.

Deletion of exempt or irrelevant information

28. 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.
29. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'⁶ 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 25.⁷
30. 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

31. On the information available, I am satisfied the exemptions in sections 33(1) and 35(1)(b) apply to the documents. I have therefore decided to refuse access to the documents in full.

Review rights

32. 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.⁸
33. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.⁹
34. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹⁰
35. 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.
36. 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.¹¹

When this decision takes effect

37. 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.

⁶ *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].

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

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

⁹ Section 52(5).

¹⁰ Section 52(9).

¹¹ Sections 50(3F) and (3FA).