

Notice of Decision and Reasons for Decision

Applicant:	'AB9'
Agency:	Edenhope & District Memorial Hospital
Decision Date:	29 March 2019
Exemptions considered:	Section 33(1)
Citation:	'AB9' and Edenhope & District Memorial Hospital (<i>Freedom of Information</i>) [2019] VICmr 18 (29 March 2019)

FREEDOM OF INFORMATION – medical records of a deceased individual – next of kin – personal affairs information

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 decide to refuse access to the documents.

My reasons for decision follow.

Joanne Kummrow
Acting Public Access Deputy Commissioner

29 March 2019

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency for access to the medical records of [their] deceased [sibling].
2. The Applicant's [sibling] passed away in [year]. The Applicant is seeking access to the documents for the purpose of maintaining family medical histories.
3. In its decision, the Agency identified documents (comprising of the late [sibling's] medical records) falling within the terms of the Applicant's request. It decided to deny access to the documents in full under section 33(1).

Review

4. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
5. I have examined copies of the documents subject to review.
6. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
7. I have considered all communications and submissions received from the parties, including:
 - (a) the Agency's decision on the FOI request;
 - (b) the Agency's submission dated 7 February 2019;
 - (c) the Applicant's submission dated 7 February 2019 and information provided with the Applicant's review application; and
 - (d) all other communications with the Agency and the Applicant.
8. 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

9. The Agency relied on the exemption in section 33(1) to refuse access to the documents on the basis disclosure of the personal affairs information of a person other than the Applicant is unreasonable in the circumstances.
10. Having considered the relevant exemptions and for the reasons set out below, I am satisfied the documents are exempt under section 33(1).

Section 33(1)

11. 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'.
12. 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
13. The exemption in section 33(1) continues to apply to the personal affairs information of a deceased person.³
14. I am satisfied the information in the medical records relates almost exclusively to the personal affairs of the Applicant's [sibling].
15. The next step, is to determine whether disclosure of the personal affairs information in the documents would be unreasonable.
16. Section 33(2B) requires that, in deciding whether the disclosure of a document under the FOI Act would involve the unreasonable disclosure of information relating to the personal affairs of any person (including a deceased person), the agency must:
 - (a) notify the person who is the subject of that information (or if that person is deceased, that person's next of kin) that the agency has received a request for access to the document;
 - (b) seek that person's view as to whether disclosure of the document should occur; and
 - (c) state that if the person consents to disclosure of the document, or disclosure subject to deletion of information relating to the personal affairs of the person, the person is not entitled to apply to the tribunal for review of a decision to grant access to that document.
17. The term 'next of kin' is not defined in the FOI Act. Section 3 of the *Human Tissues Act 1982* (Vic) provides a useful definition:

"senior available next of kin" means –

...

- (b) in relation to any other deceased person –
 - (i) where the person, immediately before the person's death, had a spouse or domestic partner and that spouse or domestic partner is available – the spouse or domestic partner;
 - (ii) where the person, immediately before the person's death, did not have a spouse or domestic partner or the spouse or domestic partner is not available – a son or daughter of the person who has attained the age of 18 years and who is available;
 - (iii) where no person referred to in subparagraph (i) or (ii) is available but a parent of the person is available that parent; or

¹ Sections 33(1) and (2).

² Section 33(9).

³ Section 33(1).

- (iv) where no person referred to in subparagraph (i), (ii), or (iii) is available – a brother or sister of the person who has attained the age of eighteen years and is available.

18. In accordance with section 33(2B), the Agency consulted with the deceased's next of kin.
19. The Agency determined the deceased person's domestic partner to be [their] next of kin and consulted with that individual about disclosure of the documents.
20. On the basis of the information before me, I accept the deceased person's domestic partner is [their] next of kin. The next of kin did not consent to disclosure of the medical records. Although I acknowledge the views of the next of kin, this is only one factor to be considered when determining whether release of the personal affairs information would be unreasonable.
21. The concept of 'unreasonable disclosure' involves balancing the competing public interest in disclosure of official information, with the personal interest in privacy in the particular circumstances of a matter.
22. The following further matters are particularly relevant, in the circumstances of this case:
 - (a) The nature of the personal affairs information – The information in the documents is the medical records of a deceased individual. I accept that medical records are sensitive to the individual to whom they relate and release of the information to any other person must be carefully considered.
 - (b) The circumstances in which the information was obtained – The information was collected by the Agency in relation to the provision of health services to the individual.
 - (c) The Applicant's interest in the information – As stated above, the Applicant seeks access to the documents for the purpose of maintaining family medical histories for the benefit of the family.

The Applicant submits [they are] the next of kin and has provided the following information to support [their] view that disclosure of the information is not 'unreasonable' in the circumstances:

- (i) [they were] requested to be the [sibling's] Medical Treatment Decision maker;
- (ii) [they were] named as the executor in [their sibling's] will;
- (iii) [they] paid for [the] funeral and [were] in daily contact with the [sibling]; and
- (iv) the [sibling] passed away without a partner in life.

There is no indication the Applicant seeks the information for the purpose of causing some kind of embarrassment or harm.

Whilst I acknowledge the Applicant's interest and purpose for seeking access to the documents, in the particular circumstances of the case, I consider the sensitive nature of the information, as well as the wishes of the next of kin to weigh heavily against disclosure of the documents.

23. On the basis of the above factors, I am of the view disclosure of the personal affairs information would be unreasonable in the circumstances.

Deletion of exempt or irrelevant information

24. 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.
25. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'⁴ 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 25.⁵
26. I have considered the effect of deleting the 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

27. On the information available, I am satisfied the exemption in section 33(1) applies to the information in the documents, and I have decided to refuse access to the documents in full.

Review rights

28. 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.⁶
29. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.⁷
30. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.⁸
31. 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.
32. 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.⁹

When this decision takes effect

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

⁵ *Honeywood v Department of Human Services* [2006] VCAT 2048 [26]; *RFJ v Victoria Police FOI Division (Review and Regulation)* [2013] VCAT 1267 at [140] and [155].

⁶ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

⁷ Section 52(5).

⁸ Section 52(9).

⁹ Sections 50(3F) and (3FA).