

Notice of Decision and Reasons for Decision

Applicant:	'AH5'
Agency:	Barwon Health
Decision Date:	23 July 2019
Exemptions considered:	Section 33(1)
Citation:	'AH5' and Barwon Health (<i>Freedom of Information</i>) [2019] VICmr 68 (23 July 2019)

FREEDOM OF INFORMATION – medical records – deceased individual – next-of-kin's views – testamentary capacity

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 a document 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 document.

My reasons for decision follow.

Sven Bluemmel
Information Commissioner

23 July 2019

Reasons for Decision

Background to review

1. The Applicant's legal representative made an FOI request to the Agency for access to:
... [a deceased individual's] medical records for the five years prior to [their] death.
2. The FOI request states that the Applicant represents the estate of [their deceased parent].
3. In its decision, the Agency identified one document totalling 24 pages falling within the terms of the Applicant's request. It decided to refuse access to the document in full.

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 document 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) information provided with the Applicant's review application;
 - (c) the Agency's submission dated 8 July 2019.
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 under section 33(1) to refuse access to the document. The Agency's decision letter sets out the reasons for its decision.

Section 33(1)

10. 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'.
11. 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

¹ Sections 33(1) and (2).

Does the document contain the personal affairs information of an individual other than the Applicant?

12. The document subject to review relates to the medical records of a deceased individual.
13. I am satisfied the document contains the personal information of an individual other than the Applicant.

Would the release of the personal affairs information be unreasonable?

14. The concept of 'unreasonable disclosure' involves balancing the public interest in the disclosure of official information with the personal interest in privacy. I have given consideration to the following factors when considering whether release of the personal affairs information would be unreasonable:

- (a) The nature of the personal affairs information – The medical information of an individual is, in and of itself, highly personal in nature. This weighs against disclosure.
- (b) The extent to which the information is widely available – There is no information before me to suggest that this information is widely available. The very nature of the information suggests that access to it would be tightly restricted. This weighs against disclosure.
- (c) The Applicant's interest in the information – The Applicant advised that the FOI request was made to determine whether the deceased individual had testamentary capacity at the time of creating a new will on [specified date]. Having reviewed the document, I note that it does not make any references to testamentary capacity or the deceased individual's mental health state. I do not consider the document would be of assistance to the Applicant. This weighs against disclosure.

Additionally, I am of the view that, should the Applicant require this document for valid legal or court-related purposes, it is likely that this document could be obtained by means of a legal subpoena.

- (d) Whether the individuals to whom the information relates object, or would be likely to object to the release of the information - In deciding whether disclosure of a document would involve the unreasonable disclosure of a third party's personal affairs information, an agency must notify that person (or their next of kin, if deceased) an FOI request has been received for documents containing the third party's personal information and seek views as to whether disclosure of the information should occur.³ The Agency consulted the deceased individual's next-of-kin who did not consent to the release of the information in the document. This, while not determinative, weighs against disclosure.
15. Section 33(2A) requires that, in deciding whether the disclosure of a document would involve the unreasonable disclosure of information relating to the personal affairs of any person, I must take into account whether the disclosure of the information would, or would be reasonably likely to, endanger the life or physical safety of any person. However, I do not consider this to be a relevant factor in the circumstances.
 16. In balancing the above factors, I have determined it would be unreasonable to release the personal affairs information in the document. Accordingly, I have determined the document is exempt from release under section 33(1).

² Section 33(9).

³ Section 33(2B).

Review rights

17. 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.⁴
18. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.⁵
19. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.⁶
20. 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.
21. 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.⁷

When this decision takes effect

22. My decision does not take effect until the relevant review period (stated above) expires. If a review application is made to VCAT, my decision will be subject to any VCAT determination.

⁴ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

⁵ Section 52(5).

⁶ Section 52(9).

⁷ Sections 50(3F) and (3FA).