

Notice of Decision and Reasons for Decision

Applicant:	'A11'
Agency:	Eastern Health
Decision Date:	1 August 2019
Exemptions considered:	Sections 33(1), 35(1)(b)
Citation:	'A11' and Eastern Health (<i>Freedom of Information</i>) [2019] VICmr 73 (1 August 2019)

FREEDOM OF INFORMATION – third party's medical records – documents affecting personal privacy of third parties – 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 differs from the Agency's decision in that I have decided to release additional information in the documents to the Applicant.

The Schedule of Documents in **Annexure 1** sets out my decision in relation to each document.

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner

1 August 2019

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency for access to their deceased mother's (the **patient**) full medical records. The documents concern the patient's hospitalisation in [year] for mental health treatment.
2. In its decision, 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. Accordingly, this review relates to 12 documents to which the Agency granted access in part.
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 submissions received from the parties, including:
 - (a) the Agency's decision on the FOI request dated 1 April 2019;
 - (b) the Applicant's submission dated 19 April 2019 and information provided with the Applicant's review application; and
 - (c) the Agency's response to inquiries made by OVIC staff.
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 exemptions in sections 33(1) and 35(1)(b) to deny access to the documents in part. 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'.

¹ Sections 33(1) and (2).

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
12. I also note the Victorian Civil and Administrative Tribunal (**VCAT**) has accepted a third party's opinion or observations about another person's conduct can constitute information related to the third party's personal affairs.³
13. The Tribunal defines the scope of 'personal affairs information' widely, including matters related to the health, private behaviour, home life or personal or family relationships of individuals.⁴
14. Determining whether disclosure would be unreasonable involves balancing the public interest in the disclosure of official information with the personal interest in privacy in the particular circumstances of a matter.
15. 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 their personal affairs information and seek their view as to whether disclosure of the information should occur.⁵ However, this obligation does not arise if:
 - (a) the notification would be reasonably likely to endanger the life or physical safety of a person, or cause them undue distress, or is otherwise unreasonable in the circumstances;
 - (b) the notification would be reasonably likely to increase the risk to the safety of a person experiencing family violence; or
 - (c) it is not practicable to do so.⁶
16. 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 circumstances in which the information was obtained;
 - (c) the Applicant's interest in the information, including their purpose or motive for seeking access to the documents;
 - (d) whether any public interest would be promoted by disclosure;
 - (e) the likelihood of further disclosure of the information if it is released;
 - (f) whether the individual to whom the information related consents or objects to the disclosure;
 - (g) whether disclosure would cause the individuals stress, anxiety or embarrassment; and
 - (h) whether the disclosure of information relating to the personal affairs of any person would, or would be likely to, endanger the life or physical safety of any person.

² Section 33(9).

³ *Richardson v Business Licensing Authority* [2003] VCAT 1053, cited in *Davis v Victoria Police (General)* [2008] VCAT 1343 at [43], *Pritchard v Victoria Police (General)* [2008] VCAT 913 at [24], *Mrs R v Ballarat Health Services (General)* [2007] VCAT 2397 at [13].

⁴ *Re F and Health Department* (1988) 2 VAR 458 as quoted in *RJF v Victoria Police FOI Division* [2013] VCAT 1267 at [103].

⁵ Section 33(2B).

⁶ Section 33(2C).

17. I have also taken into consideration the nature of disclosure of a document under the FOI Act is unconditional and unrestricted, which means an applicant is free to disseminate widely or use a document disclosed to them as they choose.⁷
18. The documents in this matter contain information communicated to and recorded by Agency staff for the purposes of providing mental health treatment and care to the patient.
19. The information the Agency exempted under section 33(1) is the:
 - (a) names and other identifying information of third parties and the Applicant;
 - (b) opinions and observations of third parties regarding the patient's health, behaviour, home life and familial relationships; and
 - (c) opinions and observations of the patient regarding other third parties.
20. The information identified by the Agency listed above amounts to 'personal affairs information' for the purposes of section 33(1).
21. In support of the review application, the Applicant submits access is sought to the patient's full medical records for personal reasons, including to understand the patient's mental state for closure and to inform the Applicant about medical conditions that may be present within the family 'from a genetics perspective'.
22. The Agency advised it did not consult with the third parties whose personal affairs information is in the documents on the basis consultation was not practicable. I have considered the Agency's reasons and accept third party consultation is not practicable in the circumstances.
23. While I appreciate the Applicant's strong personal interest in this information, I am satisfied it would be unreasonable to release certain sensitive personal affairs information of third parties and the patient in the documents. In doing so, I considered the following factors in my decision:
 - (a) The Agency released much of the information contained in the documents to the Applicant wherever possible.
 - (b) The nature of the personal affairs information is particularly sensitive and personal, as it relates to information communicated in confidence during a referral and the patient's subsequent hospitalisation.
 - (c) Despite the passage of time since the documents were created – approximately 19 years – I consider the sensitive nature of sensitive personal affairs information has not subsided over the intervening period.
 - (d) I am satisfied there is no overriding public interest in disclosing certain sensitive personal affairs information of the patient and other third parties. In my view release of this information would not promote the public interest in patients and other persons providing confidential and sensitive information to the Agency in the course of receiving medical treatment.
 - (e) In some instances, the personal affairs information of the patient is intertwined with the personal affairs information of other third parties.

⁷ *Victoria Police v Marke* [2008] VCSCA 218 at [68].

- (f) The fact that the nature of disclosure under the FOI Act is unrestricted and unconditional in terms of further use and dissemination of the documents disclosed.
 - (g) 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.
24. However, having carefully reviewed the documents, I have determined that while it would be unreasonable to release certain personal affairs information, disclosure of certain information to the Applicant in this instance would not be unreasonable given the nature of the personal affairs information already released to the Applicant, the Applicant's relationship with the patient and the passage of time.
25. The Schedule of Documents in **Annexure 1** summarises my decision in relation to section 33(1) with respect to each document.

Section 35(1)(b)

26. The Agency denied access to parts of the documents, based on its application of section 35(1)(b).
27. 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.
28. When determining whether information was communicated in confidence, it is necessary to consider the position from the perspective of the communicator.⁸ Further, confidentiality can be express or implied from the circumstances of the matter.⁹
29. The information considered exempt includes information voluntarily provided to healthcare workers by third parties, including the patient, family members and health services workers. This information has been recorded and received by Agency staff during the patient's hospitalisation.
30. I consider it reasonable to infer third parties, including the patient, provided the information exempted by the Agency on a confidential basis. While I do not have specific information regarding the view of these third parties to disclosure, given the sensitivity of the information, I consider it reasonably likely they would have communicated the information in confidence to inform the patient's medical treatment and care.
31. Therefore, I am satisfied the exempt 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 was communicated confidentially is not the only consideration in relation to the exemption in section 35(1)(b).
32. 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

⁸ *XYZ v Victoria Police* [2010] VCAT 255 at [265].

⁹ *Ibid.*

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 healthcare providers.

33. There is a public interest in individuals being able to provide what is often sensitive information about themselves and others to medical professionals and staff. Where this occurs, members of the public and patients need to feel confident information recorded in a patient's medical records, including the identity of the person providing the information, will be held in confidence by the agency.¹⁰ If individuals are unable to speak frankly and provide what may often be sensitive information to medical professionals and staff, this may detrimentally affect the appropriateness and quality of medical treatment and care provided to patients.
34. The public interest test in section 35(1)(b) is narrow, in that it is directed toward the impact release would have on an agency's ability to obtain similar information in the future. The exemption does not permit me to have regard to other matters, such public interest factors in favour of release, or the extent to which an applicant's personal interest in the document would be served by granting access to the documents.
35. While I acknowledge the Applicant has a genuine interest in obtaining the patient's full medical records, I have determined the need to protect certain sensitive information provided by third parties in confidence to health services, including the Agency, outweighs the Applicant's personal interest in obtaining access to this information.
36. Accordingly, I accept the release of certain confidential information would likely result in members of the public being less forthcoming with public health service providers, which in turn may undermine the ability of the Agency, and similar health service providers, to effectively and safely diagnose and treat patients. However, having carefully reviewed the documents, the nature of information already released to the Applicant, the Applicant's relationship with the patient and the passage of time, I have determined that while certain information was provided to the Agency in confidence, its disclosure to the Applicant in this instance will not impair the Agency's ability to obtain similar information in the future.
37. The Schedule of Documents in **Annexure 1** summarises my decision in relation to section 35(1)(b) with respect to each document.

Deletion of exempt or irrelevant information

38. 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.
39. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'¹¹ 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 25.¹²
40. I have considered the effect of deleting exempt information from the documents. In my view, it is practicable to delete the exempt information as to do so would not require substantial time and effort, and the edited documents would retain meaning.

¹⁰ See *Maki v Alfred Hospital*, unreported, VCAT, Davis M, 19 April 2002.

¹¹ *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].

¹² *Honeywood v Department of Human Services* [2006] VCAT 2048 at [26]; *RFJ v Victoria Police FOI Division (Review and Regulation)* [2013] VCAT 1267 at [140] and [155].

Conclusion

41. On the information available, I am satisfied the exemptions in sections 33(1) and 35(1)(b) apply to the documents. **Annexure 1** sets out my decision in relation to each of the documents.
42. As it is practicable to edit the documents to delete exempt information, I have determined to grant access to the documents in part.

Other matters

43. Section 49P(5) states that if I decide to disclose a document claimed to be exempt under section 33(1) I must, if practicable, notify any person who has a right to apply to VCAT for a review of my decision of their right to do so.
44. In considering the meaning of 'practicable' in relation to other sections of the FOI Act, VCAT has held:

The use of the word 'practicable' in the legislation to my mind connotes a legislative intention to apply common sense principles. 'Practicable' is not a term of art or a term of precise meaning.

... The use of the word indicates there should be imported into the process the exercise of judgment by the agency concerned. It does not allow for the conclusion that because a task is possible, it must, ergo, be undertaken.¹³
45. VCAT also considers the possibility of an unnecessary intrusion into the lives of third parties is relevant when assessing the practicability of notifying them.¹⁴
46. In this case, I have decided notifying relevant third parties of my decision to disclose certain personal affairs information would be an unnecessary intrusion for the following reasons:
 - (a) the age of the documents requested – they are [over 15] years old;
 - (b) the context in which the information was provided;
 - (c) it may reasonably cause third parties undue distress; and
 - (d) it is likely some third parties would now be deceased or may not otherwise be contactable.
47. On balance, given the unnecessary intrusion into the lives of the individuals whose personal information appears in the documents, I am not satisfied it is practicable to notify those individuals of their right of review.

Review rights

48. If either party to this review is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.¹⁵
49. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹⁶
50. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹⁷

¹³ *Re Schubert and Department of Premier and Cabinet* (2001) 19 VAR 35 at [45].

¹⁴ *Coulston v Office of Public Prosecutions Victoria* [2010] VCAT 1234 at [42].

¹⁵ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

¹⁶ Section 52(5).

51. 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.
52. 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.¹⁸

When this decision takes effect

53. 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

¹⁷ Section 52(9).

¹⁸ Sections 50(3F) and (3FA).

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
1.	[Date]	Health Service Referral	5	Released in part Sections 33(1), 35(1)(b)	<p>Release in part</p> <p>Sections 33(1), 35(1)(b), 25</p> <p>This document is to be released with exception of the following information, which is exempt under sections 33(1) and 35(1)(b):</p> <ul style="list-style-type: none"> • 'Page 8': the third dot point under 'Presenting Problem'; • 'Page 10': the second line and last three words of the third line under 'Personal History'; • 'Page 12': the first sentence contained in the fifth line under 'Stream and Content of Thought'. <p>The above exempt information is to be deleted in accordance with section 25.</p>	<p>Section 35(1)(b): Given the nature of the information provided by the patient to medical professionals and staff about [the patient's] health and family relationships and the context in which it was provided (in a clinical setting), I am satisfied information redacted by the Agency was provided by the patient to the Agency in confidence. For the reasons set out above, I am satisfied release of certain information in the documents would impair the Agency's ability to obtain the same or similar information in the future. Accordingly, I am satisfied the information exempted by the Agency is exempt under section 35(1)(b).</p> <p>Sections 33(1): The personal affairs information redacted by the Agency is sensitive information provided by the patient to medical professionals and staff about [the patient's] health and family relationships. I am also satisfied this information concerns the personal affairs information of the patient and is intertwined with the personal affairs information of the third parties. For the reasons set out above, I am satisfied it would be unreasonable to release this information to the Applicant. Accordingly, I am satisfied the information exempted by the Agency is exempt under section 33(1).</p>

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
2.	[Date]	Continuation Sheet	2	Released in part Sections 33(1), 35(1)(b)	Release in part Sections 35(1)(b), 25 This document is to be released with exception of the following information, which is exempt under section 35(1)(b): <ul style="list-style-type: none"> 'Page 13': lines 26 to 28. The above exempt information is to be deleted in accordance with section 25.	<p>Section 35(1)(b): Refer to my comments in Document 1 above.</p> <p>Section 33(1): The personal affairs information redacted by the Agency is information provided by the patient to medical professionals and staff about [the patient's] health and family relationships. I am also satisfied this information concerns the personal affairs information of the patient and is intertwined with the personal affairs information of other parties. I am not satisfied it would be unreasonable to release this information to the Applicant as the information is not sensitive in nature.</p>
3.	Unknown	Continuation Sheet	1	Released in part Sections 33(1), 35(1)(b)	Release in full	<p>Section 35(1)(b): Given the context in which the information was provided (in a clinical setting), I am satisfied the information redacted by the Agency was provided by the patient to the Agency in confidence. However, the information is not particularly sensitive or personal, particularly in comparison with information already released by the Agency. For these reasons, I am not satisfied that the release of this information would impair the Agency's ability to obtain the same or similar information in the future. Accordingly, I am not satisfied the information is exempt under section 35(1)(b).</p>

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Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
						Section 33(1): Refer to my comments in Document 2 above.
4.	[Date]	Continuation Sheet	2	Released in part Sections 33(1), 35(1)(b)	Release in part Sections 33(1), 35(1)(b), 25 This document is to be released with exception of the following information, which is exempt under sections 33(1) and 35(1)(b): <ul style="list-style-type: none"> 'Page 34': lines 27 to 30. The above exempt information is to be deleted in accordance with section 25.	<p>Section 35(1)(b): The material redacted by the Agency on 'Page 33' and the 26th line of 'Page 34' is not exempt under section 35(1)(b). Refer to my reasons in document 3 above for my reasons. However, I am satisfied the information exempted by the Agency on 'Page 34' is exempt under section 35(1)(b) for the reasons outlined above.</p> <p>Section 33(1): The personal affairs information redacted by the Agency is information provided by the patient and third parties to medical professionals and staff about [the patient's] health and family relationships. In regard to the information exempted by the Agency on 'Page 33' and line 26 of 'Page 34', refer to my comments in Document 2 above. In regard to the information exempted by the Agency in lines 27 to 30 on 'Page 34', refer to my comments in Document 1 above.</p>
5.	[Date]	Continuation Sheet	2	Released in part Sections 33(1), 35(1)(b)	Release in full	<p>Section 35(1)(b): Refer to my comments in Document 3 above.</p> <p>Section 33(1): This document contains the personal affairs information of third parties. Refer to my comments in Document 2 above.</p>

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6.	[Date]	Continuation Sheet	1	Released in part Section 33(1)	Release in full	Section 33(1): Refer to my comments in Document 2 above.
7.	[Date]	Early Discharge Management Request Form	2	Released in part Section 33(1)	Release in full	Section 33(1): The personal affairs information redacted by the Agency is personal affairs information of third parties. Refer to my comments in Document 2 above.
8.	[Date]	Intra Service Transfer/ Case Closure	2	Released in part Section 33(1)	Release in part Sections 33(1), 35(1)(b), 25 This document is to be released with exception of the following information, which is exempt under sections 33(1) and 35(1)(b): <ul style="list-style-type: none"> 'Page 46': the fourth dot point under 'Ongoing Problems'. The above exempt information is to be deleted in accordance with section 25.	Section 35(1)(b): Although the Agency did not rely on the exemption in section 35(1)(b), I am satisfied information contained in this document is exempt under section 35(1)(b) for the reasons outlined in Document 1 above. Section 33(1): In regard to the information redacted by the Agency on 'Page 46', refer to my comments in Document 1 above. I am not satisfied the remainder of the information redacted by the Agency is exempt under section 33(1). Refer to my comments in Document 2 above.
9.	[Date]	First Contact/ Duty / Triage	2	Released in part	Release in part	Section 33(1): I am satisfied the information redacted by the Agency on the sixth line of 'Page

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Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
		Form		Section 33(1)	<p>Sections 33(1), 25</p> <p>This document is to be released with exception of the following information, which is exempt under section 33(1):</p> <ul style="list-style-type: none"> 'Page 52': the word redacted by the Agency in line six. <p>The above exempt information is to be deleted in accordance with section 25.</p>	53' is exempt under section 33(1). Refer to my comments in Document 1 for my reasons. I am not satisfied the remainder of the personal affairs information redacted by the Agency is exempt under section 33(1). Refer to my comments in Document 2 above.
10.	[Date]	Early Discharge Management Request Form	2	Released in part Section 33(1)	Release in full	Section 33(1): This document is a duplicate of document 7, with the addition of two handwritten notes. Refer to my comments in Document 2 above.
11.	[Date]	Discharge Summary	4	Released in part Sections 33(1), 35(1)(b)	<p>Release in part</p> <p>Sections 33(1), 35(1)(b), 25</p> <p>This document is to be released with exception of the following information:</p> <ul style="list-style-type: none"> 'Page 55': the fourth line 	Section 35(1)(b): In relation to the information exempted by the Agency on 'Page 55', refer to my comments in Document 1 above. I am not satisfied information redacted by the Agency on 'Page 57' is information communicated to the Agency in confidence, as it contains observations of Agency staff regarding third parties. Accordingly, this information is not exempt

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Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
					<p>under 'history of present illness', which is exempt under section 35(1)(b) and 33(1);</p> <ul style="list-style-type: none"> • 'Page 56': the first sentence under 'personal history', which is exempt under section 33(1); • 'Page 57': the second sentence of the third paragraph under 'treatment and progress', which is exempt under section 33(1) • 'Page 57': words 8 to 12 and 33 to 24 of the fourth paragraph under 'treatment and progress' which is exempt under section 33(1). <p>The above exempt information is to be deleted in accordance with section 25.</p>	<p>under section 35(1)(b).</p> <p>Section 33(1): Refer to my comments in Document 1 above.</p>
12.	[Date]	[Location] Mental Health	4	Released in part	Release in full	Section 35(1)(b): The information redacted by the Agency contains information provided to the

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Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
		Service Assessment Form		Sections 33(1), 35(1)(b)		<p>Agency by third parties. Refer to my comments in Document 3 above.</p> <p>Section 33(1): Refer to my comments in Document 2 above.</p>