



Office of the Victorian
Information Commissioner

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Notice of Decision and Reasons for Decision

Applicant:	'AJ7'
Agency:	Eastern Health
Decision Date:	30 August 2019
Exemption considered:	Sections 33(1), 35(1)(b)
Citation:	'AJ7' and Eastern Health (<i>Freedom of Information</i>) [2019] VICmr 88 (30 August 2019)

FREEDOM OF INFORMATION – medical records – personal affairs information of a third party – information provided in confidence by 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 is the same as the Agency in that I have determined information exempted by the Agency is exempt under section 33(1).

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner

30 August 2019

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency for access to their deceased father's (the **patient**) medical records.
2. The patient's senior next of kin provided consent to the Applicant accessing the patient's medical records.
3. Following consultation by telephone with the Agency, the Applicant amended the scope of the original request to reports and notes from the oncologist and/or radiologist, in the form of correspondence and discharge summaries.
4. In its decision, the Agency identified certain documents falling within the terms of the Applicant's request and determined to grant access to the documents in part.

Review

5. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
6. The Applicant seeks review of the Agency's decision in relation to one document only.
7. I have examined a copy of the document.
8. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
9. I have considered all communications and submissions received from the parties, including:
 - (a) the Agency's decision on the FOI request dated 21 May 2019;
 - (b) the Applicant's submission dated 24 May 2019; and
 - (c) information provided by the Agency during my review.
10. 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

11. The Agency relied on the exemptions in section 33(1) and 35(1)(b) to refuse access to certain information in the documents. The Agency's decision letter sets out the reasons for its decision. As stated above, the Applicant seeks review of the Agency's decision in relation to one document only.

Section 33(1)

12. 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'.
13. 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
14. 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.
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 is a relevant factor in this matter.
16. 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 information and seek their view as to whether disclosure of the document should occur.³ 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.⁴
17. The Agency advised it did not consult with a relevant third party. On the information before me, I am satisfied it was not practicable for the Agency to undertake consultation in the circumstances.
18. The document is a letter from the patient's medical oncologist to a medical practitioner regarding the patient's prognosis and future care. The information deleted by the Agency contains information communicated to the medical oncologist by a third party about the welfare of the patient.
19. I am satisfied the information exempted by the Agency is the personal affairs information of a third party for the purposes of section 33(1).
20. The following matters are particularly relevant, in the circumstances of this matter:
 - (a) the nature of the personal affairs information (for example, whether it is sensitive or its current relevance);

¹ Sections 33(1) and (2).

² Section 33(9).

³ Section 33(2B).

⁴ Section 33(2C).

- (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; and
 - (e) whether the individual to whom the information related consents or objects to the disclosure.
21. I have also taken into consideration the nature of disclosure of a document under the FOI Act is unconditional and unrestricted. This means an applicant is free to disseminate widely or use a document disclosed to them as they choose.⁵
22. I appreciate the Applicant's strong personal interest in this information. I also acknowledge the Applicant would wish for a complete copy of the document without any redactions, as redactions made to documents can create a sense of disappointment and frustration to applications, regardless of whether only a small amount of material is withheld.
23. However, in the circumstances, I am satisfied it would be unreasonable to release certain personal affairs information of a third party in the document. In doing so, I considered the following factors in my decision:
- (a) Given its nature and the context in which the information was communicated, I consider it reasonable to infer a third party intended the information be provided in confidence to assist in the patient's care.
 - (b) I am satisfied there is no overriding public interest in disclosing this information. In my view, release of this information would not promote the public interest in third parties speaking frankly and providing information to healthcare services. I accept the Agency, as a provider of health service, relies on information provided by third parties voluntarily to provide effective treatment and care to its patients.
 - (c) If third parties, who provide information in the interests of a patient's health and wellbeing, were aware information they considered was communicated in confidence would be disclosed to the patients or other individuals, they would be less forthcoming in providing information of a similar nature in the future. I also note information of this nature is often sensitive and personal in nature and provided to assist a health service provider to effectively and safely diagnose and treat patients by providing them with necessary medical treatment and care.
24. As I am satisfied the information deleted by the Agency is exempt under section 33(1), it is not necessary for me to consider the application of section 35(1)(b), which the Agency also relied on to exempt the information.

Deletion of exempt or irrelevant information

25. 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.

⁵ *Victoria Police v Marke* [2008] VCSCA 218 at [68].

26. 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
27. I have considered the effect of deleting exempt information from the document. In my view, it is practicable for the Agency to delete the exempt information, because it would not require substantial time and effort, and the edited documents would retain meaning.

Conclusion

28. My decision on the Applicant's request is the same as the Agency's decision in that I have decided information deleted by the Agency is exempt under section 33(1).
29. As it is practicable to edit the document to delete exempt information, I have determined to grant access to the document in part.

Review rights

30. 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
31. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.⁹
32. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹⁰
33. 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.
34. 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

35. 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.

⁶ *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].

⁷ *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].

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).