

## Notice of Decision and Reasons for Decision

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Applicant:	'AK1'
Agency:	Melbourne Health
Decision Date:	3 September 2019
Exemptions considered:	Sections 33(1), 35(1)(b)
Citation:	'AK1' and Melbourne Health ( <i>Freedom of Information</i> ) [2019] VICmr 91 (3 September 2019)

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FREEDOM OF INFORMATION – hospital progress notes – personal affairs information – unreasonable disclosure – information 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 fresh 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 document.

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

My reasons for decision follow.

**Joanne Kummrow**  
Public Access Deputy Commissioner

3 September 2019

## Reasons for Decision

### Background to review

1. The Applicant made a request to the Agency for access to the following documents:

All documents since commencement of treatment at RMH ([year]).
2. In its decision dated 2 April 2019, the Agency denied the Applicant's request in full under section 25A(5)(b)(ii).

### Review

3. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
4. During the handling of the review, the Applicant agreed to accept edited copies of the documents. Accordingly, the Agency made a fresh decision under section 49M.
5. Section 49M(1) permits an agency to make a fresh decision on an FOI request during a review. On 5 July 2019, the Agency made a fresh decision granting access to certain documents. This decision was made within the required 28 days under section 49M(2).
6. In its decision, the Agency identified a total of 1169 pages falling within the terms of the Applicant's request. It decided to grant access to the majority of the documents in full, with exception to one document, to which the Agency granted access in part.
7. The Applicant did not agree with the Agency's fresh decision and, as required by section 49MA(2), I proceeded with my review on the basis of the fresh decision. Therefore, this review is only in relation to the one document to which the Agency granted partial access.
8. I have examined a copy of the document subject to review.
9. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
10. I have considered all communications and submissions received from the parties, including:
  - (a) the Agency's decision on the FOI request;
  - (b) the Applicant's submissions dated 7 and 19 August 2019 and information provided with the Applicant's review application; and
  - (c) the Agency's submission dated 13 August 2019 and information communicated through discussions with this office.
11. 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

12. The Agency relied on the exemptions in sections 33(1) and 35(1)(b) to refuse access to the document in part. The Agency's decision letter sets out the reasons for its decision.

### **Section 33(1)**

13. 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;<sup>1</sup> and
  - (b) such disclosure would be 'unreasonable'.

#### *Does the information constitute 'person affairs information'?*

14. 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.<sup>2</sup>
15. 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.<sup>3</sup>
16. The document subject to review comprises of progress notes completed by a social worker and other Agency officers.
17. The information exempted by the Agency under section 33(1) includes:
- (a) information provided by the patient about their personal history; and
  - (b) the names and other identifying information of two third parties.
18. I am satisfied the information identified by the Agency listed above amounts to 'personal affairs information' for the purposes of section 33(1).

#### *Would disclosure of the information constitute unreasonable disclosure?*

19. 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.
20. 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.
21. 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.<sup>4</sup> However, this obligation does not arise if:

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<sup>1</sup> Sections 33(1) and (2).

<sup>2</sup> Section 33(9).

<sup>3</sup> *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].

<sup>4</sup> Section 33(2B).

- (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.<sup>5</sup>
22. In this instance, the Agency advised it was not practicable to consult with the third parties. I have considered the Agency's reasons and accept third party consultation is not practicable in the circumstances.
23. In determining whether the release of the personal affairs information is unreasonable, I consider the following matters are particularly relevant:
- (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 individuals to whom the information relates consent or object 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.
24. I have also taken into consideration that 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.<sup>6</sup>
25. I am satisfied it would be unreasonable to release the personal affairs information of one of the third parties in this instance, for the following reasons:
- (a) Given the nature and the context in which the information was communicated, I consider it reasonable to infer the third party intended the information to be provided to the Agency in confidence, in so far as it relates to their own care.
  - (b) While I do not have information regarding the third party's view as to the release of their personal affairs information, I consider it likely the third party would not consent to the release of this information in the circumstances.
  - (c) While the information communicated by the third party is not particularly sensitive, I consider the information to be personal to the third party concerned. In relation to this case, I accept that if individuals who provide information to the Agency about a patient and their own care were aware their identity and the information they provided would be disclosed in response to

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<sup>5</sup> Section 33(2C).

<sup>6</sup> *Victoria Police v Marke* [2008] VCSA 218 at [68].

an FOI request, they would be less likely to communicate similar information to the Agency in the future. If individuals are unable to speak frankly and provide information to health service providers, the appropriateness and quality of care provided to patients or vulnerable members of the public may be detrimentally affected.

26. While I acknowledge the Applicant has a genuine interest in obtaining their full medical records, I have determined the need to protect certain information provided by a third party in confidence to health services outweighs the Applicant's personal interest in obtaining this information.
27. The Schedule of Documents in **Annexure 1** sets out my decision in relation to the material exempted by the Agency in the document.

**Section 35(1)(b)**

28. 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.
29. When determining whether information was communicated in confidence, it is necessary to consider the position from the perspective of the communicator.<sup>7</sup> Further, confidentiality can be expressed or implied from the circumstances of the matter.<sup>8</sup>

*Was the information or matter communicated in confidence?*

30. The information considered exempt by the Agency includes:
  - (a) information provided by the Applicant to the Agency; and
  - (b) an administrative direction regarding the patient's care communicated by a social worker to the clinical team of the Agency.
31. This information has been recorded and received by Agency officers during the course of the Agency providing treatment to the Applicant.
32. Accordingly, I am satisfied the information was communicated to the Agency in confidence.
33. However, the fact the information was communicated in confidence is not the only consideration in relation to the exemption in section 35(1)(b).

*Would disclosure be contrary to the public interest as it would be reasonably likely to impair the ability of the agency to obtain similar information in the future?*

34. The exemption also requires I consider whether the Agency would be impaired from obtaining similar information in the future if 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 from providing similar information to healthcare providers.
35. I do not consider the release of information provided by the Applicant to the Agency outweighs the public interest in this instance. Having considered the nature of the information already provided to

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<sup>7</sup> *XYZ v Victoria Police* [2010] VCAT 255 at [265].

<sup>8</sup> *Ibid.*

the Applicant by the Agency, and the similar information expressed by the Applicant in their submissions, I have determined that while certain information was provided to the Agency in confidence, its disclosure to the Applicant in this instance would not impair the Agency's ability to obtain similar information in the future.

36. Furthermore, I am not satisfied release of the information exempted by the Agency regarding the patient's social worker will impair the ability of the Agency to obtain similar information in the future, for the following reasons:
- (a) I do not accept disclosure in this instance will have any material or lasting effect on the advice and other communications from healthcare staff to the Agency, given their professional obligations and responsibilities.
  - (b) The information is not particularly sensitive and most of the information communicated by the patient to the social worker has been released by the Agency in its decision.
  - (c) I do not consider release of the information will be reasonably likely to impair the ability of the Agency from obtaining information from patients in the future.
  - (d) I do not agree with the Agency's submission that 'misinterpreting what was intended by the entry' is relevant to considerations under section 35(1)(b).

#### ***Deletion of exempt or irrelevant information***

37. 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.
38. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'<sup>9</sup> 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.<sup>10</sup>
39. I have considered the effect of deleting exempt information from the documents. In my view, it is practicable to delete the exempt information, because it would not require substantial time and effort, and the edited documents would retain meaning.

#### ***Conclusion***

40. On the information available, I am satisfied the exemption in section 33(1) applies to part of the document. However, I am not satisfied section 35(1)(b) applies to the material exempted by the Agency for the reasons outlined above. The Schedule of Documents in **Annexure 1** sets out my decision in relation to each of the exemptions.
41. As it is practicable to edit the document to delete exempt information, I have determined to grant access to the document in part.

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<sup>9</sup> *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 [82].

<sup>10</sup> *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].

## Review rights

42. If either party to this review is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.<sup>11</sup>
43. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.<sup>12</sup>
44. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.<sup>13</sup>
45. Information about how to apply to VCAT is available online at [www.vcat.vic.gov.au](http://www.vcat.vic.gov.au). Alternatively, VCAT may be contacted by email at [admin@vcat.vic.gov.au](mailto:admin@vcat.vic.gov.au) or by telephone on 1300 018 228.
46. 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.<sup>14</sup>

## Other matters

47. 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.
48. In considering the meaning of 'practicable' in relation to other sections of the FOI Act, VCAT has stated the following:

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.<sup>15</sup>

49. VCAT also considers the possibility of an unnecessary intrusion into the lives of third parties is relevant when assessing the practicability of notifying them.<sup>16</sup>
50. Given the nature of the matter involving the Applicant, there are multiple third parties named in the document.
51. I have decided that notifying the relevant third parties would be an unnecessary intrusion for the following reasons:
  - (a) the nature of the information;
  - (b) the context in which the information was provided, being during the provision of healthcare services;
  - (c) it may reasonably cause third parties undue stress; and
  - (d) it is reasonably likely third parties are not contactable.

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<sup>11</sup> The Applicant in section 50(1)(b) and the Agency in section 50(3D).

<sup>12</sup> Section 52(5).

<sup>13</sup> Section 52(9).

<sup>14</sup> Sections 50(3F) and (3FA).

<sup>15</sup> *Re Schubert and Department of Premier and Cabinet* (2001) 19 VAR 35 at [45].

<sup>16</sup> *Coulston v Office of Public Prosecutions Victoria* [2010] VCAT 1234 at [42].

52. On balance, given the unnecessary intrusion into the lives of the individuals whose personal information appears in the document, I am not satisfied it is practicable to notify those individuals of their review rights.

***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.



Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
1.	[Date]	Clinical Progress Notes	3	Released in part  Sections 33(1), 35(1)(b)	<p><b>Release in part</b></p> <p>Sections 33(1), 25</p> <p>The document is to be released with the following exempt information under section 33(1) deleted in accordance with section 25:</p> <p>(a) Words 1 to 4 and fourth sentence in the note recorded at '0645' on page 3.</p>	<p><b>Section 33(1):</b> I am satisfied it would be unreasonable to release the personal affairs information of the third party on page 3, as it is likely that this information was provided in confidence and the third party would not consent to its release.</p> <p>I am not satisfied it is unreasonable to release the personal affairs information relating to the other third party, as the personal affairs information was provided by the Applicant.</p> <p><b>Section 35(1)(b):</b> I am not satisfied release of the information redacted by the Agency under section 35(1)(b) would impair the ability of the Agency to obtain similar information in the future, as explained in the reasons for decision.</p>