

Notice of Decision and Reasons for Decision

Applicant:	'AN2'
Agency:	Austin Health
Decision Date:	26 September 2019
Exemption considered:	Section 35(1)(b)
Citation:	'AN2' and Austin Health (<i>Freedom of Information</i>) [2019] VICmr 119 (26 September 2019)

FREEDOM OF INFORMATION – medical records – information obtained in confidence – impair the ability of an agency to obtain similar information in the future

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 decided to refuse access to part of the document.

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner

26 September 2019

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency for access to [their] medical record.
2. In its decision, the Agency identified a document falling with the terms of the Applicant's request. It decided to grant access to the document 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. I have examined a copy of the document subject to review.
5. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
6. I have considered all communications and submissions received from the parties, including:
 - (a) information provided with the Applicant's review application and the Applicant's submission dated 16 September 2019; and
 - (b) the Agency's decision on the FOI request the Agency's submission dated 27 August 2019.
7. 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

8. The Agency relied on the exemption under section 35(1)(b) to refuse access to part of one page of the document. The Agency's decision letter sets out the reasons for its decision.

Section 35(1)(b) – Document containing material obtained in confidence

9. 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.

Was the information or matter communicated in confidence?

10. When determining whether the information was communicated in confidence, it is necessary to consider the position from the perspective of the communicator, noting that confidentiality can be expressed or implied from the circumstances of the matter.¹

¹ *XYZ v Victoria Police* [2010] VCAT 255 at [265].

11. The document includes information communicated by a family member of the Applicant to a clinician of the Agency, in the course of the Applicant's medical care and treatment.
12. The information is marked as confidential.
13. That something is marked as confidential is not sufficient in itself to establish the communication was made in confidence. Rather, the 'understanding of the party communicating and the circumstances surrounding the communication or the very nature of the information may be sufficient in themselves'.²
14. The Agency submits consultation was impractical due to the significant lapse of time since the entry was made and the difficulties in establishing the current contact details of the communicator.
15. I have considered the sensitive nature of the information and the circumstances in which it was divulged.
16. Having reviewed the document and the nature of the information provided by the communicator, I am satisfied it would be reasonably likely the communicator would expect the information provided would remain confidential.
17. Accordingly, I am satisfied disclosure of the information contained in the document would divulge information communicated in confidence to the Agency.

Would disclosure be contrary to the public interest?

18. Section 35(1)(b) also requires consideration of whether the agency would be impaired from obtaining similar information in the future if the information were to be disclosed under the FOI Act. This means I must be satisfied that, if the information were to be disclosed, others in the position of the communicator would be reasonably likely not to provide similar information to the Agency in the future.
19. There is an essential public interest in individuals being able to provide what is often sensitive and confidential information to medical professionals employed or engaged by a public health service. Medical staff rely on such information to assist in the provision of medical treatment to patients under their care.
20. I accept that if persons, who provide confidential and sensitive information to medical professionals in relation to patients in the care of the Agency would be routinely disclosed in response to an FOI request, they would be less likely to communicate similar information to the Agency in the future.
21. Consequently, I am satisfied this could compromise the appropriateness and quality of care provided to patients by the Agency. I consider this would be a significant and detrimental outcome for the Agency and similar health care providers who, at times, rely on information provided by a number of sources to effectively diagnose and safely treat patients in the future. Further, it would be contrary to the interests of a patient receiving medical treatment and other health services from the Agency.
22. Accordingly, I am satisfied the information in the document is exempt under section 35(1)(b).

Deletion of exempt or irrelevant information

23. 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.

² *Thwaites v Department of Health and Community Services* (1995) 8 VAR 361 at [366]; *Corry v Police (Vic)* [2010] VCAT 282.

24. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'³ 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 25.⁴
25. I have considered the information deleted by the Agency as exempt. I agree with the Agency's deletions. On this basis, I am satisfied it is practicable to provide the Applicant with an edited copy of the document with the exempt information deleted.

Conclusion

26. My decision is the same as the Agency's decision in that I am satisfied the document is exempt under section 35(1)(b).
27. As I am satisfied it is practicable to provide the Applicant with an edited copy of the document with the exempt information deleted, I have decided to grant access to the document in part.

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.⁵
29. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.⁶
30. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.⁷
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 (international callers dial +61 3 8685 1462).
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.⁸

When this decision takes effect

33. 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.

³ *Mickelborough v Victoria Police (General)* [2009] VCAT 2786 [31]; *The Herald and Weekly Times Pty Limited v The Office of the Premier (General)* [2012] VCAT 967 [82].

⁴ *Honeywood v Department of Human Services* [2006] VCAT 2048 [26]; *RFJ v Victoria Police FOI Division (Review and Regulation)* [2013] VCAT 1267 [140], [155].

⁵ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

⁶ Section 52(5).

⁷ Section 52(9).

⁸ Sections 50(3F) and (3FA).