

## Notice of Decision and Reasons for Decision

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Applicant:	'AN6'
Agency:	Melbourne Health
Decision Date:	30 September 2019
Exemptions considered:	Sections 33(1), 35(1)(b)
Citation:	'AN6' and Melbourne Health ( <i>Freedom of Information</i> ) [2019] VICmr 123 (30 September 2019)

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FREEDOM OF INFORMATION – health records – third party communications – mental health triage documents – documents affecting personal privacy – material obtained by agency 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 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 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

30 September 2019

## Reasons for Decision

### Background to review

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

...all the records held by you're [sic] department in relation to a crisis assessment team (CAT) call you received on the [date] about myself. This is due to the fact that I believe this complaint/report was made out of spite or was at the very least deliberately misinforming to the CAT team.

The information I want is the name of the person who made the complaint.

A copy of the complaint/report e.g what was reported?

A copy of the notes and discussions had between the CAT team on why they decided to take the course of action that was taken. E.G why instead of calling me did the CAT team only attempt to call [a relative] and then send 4 police officers to my house.

Why was the decision made to only attempt to contact with [a relative] and not myself?

[...]

2. In its decision, the Agency identified three documents within the terms of the Applicant's request. It decided to grant access to 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. I have examined copies of the documents 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 received from the parties, including:
  - (a) the Agency's decision on the FOI request; and
  - (b) information provided with the Applicant's review application.
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 sections 33(1) and 35(1)(b) to refuse access to the documents in part. The Agency's decision letter sets out the reasons for its decision.

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

9. 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'.

#### *Do the documents contain 'personal affairs information'?*

10. 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>
11. The information exempted by the Agency under section 33(1) includes:
- (a) names;
  - (b) a business address;
  - (c) referral source;
  - (d) service recipient;
  - (e) employment position titles;
  - (f) mobile telephone number; and
  - (g) other information identifying third parties.
12. I am satisfied the information exempted by the Agency under section 33(1) is personal affairs information for the purposes of section 33(1).

#### *Is disclosure of the personal affairs information unreasonable?*

13. 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.
14. 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; and
  - (e) whether the individual to whom the information related consents or objects to the disclosure.

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

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

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 this matter.
16. In the circumstances, I am satisfied it would be unreasonable to release certain personal affairs information of third parties in the document. In doing so, I considered the following factors in my decision:
  - (a) Given the nature and context in which the information was communicated, I consider it reasonable the third parties would likely object to the release of their personal affairs information. For certain third parties, the documents explicitly note their view that they sought to remain anonymous.
  - (b) Considering the sensitive circumstances surrounding the documents and the nature of the information provided, I consider the information was communicated by the third parties to the Agency with an expectation of confidentiality.
  - (c) While I acknowledge the Applicant's significant interest in obtaining the information, I must also consider the privacy of the third parties and impact that disclosure will have on the provision of healthcare services to the community.
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.<sup>3</sup>
18. 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 applicants, regardless of whether only a small amount of material is withheld.
19. However, for the reasons set out above, I am satisfied certain personal affairs information in the documents is exempt under section 33(1).
20. The application of section 33(1) to each document is set out in **Annexure A**.

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

21. 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?*

22. When determining whether information was communicated in confidence, it is necessary to consider the position from the perspective of the communicator.<sup>4</sup> Further, confidentiality can be express or implied from the circumstances of the matter.<sup>5</sup>

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<sup>3</sup> *Victoria Police v Marke* [2008] VCSCA 218 at [68].

<sup>4</sup> *XYZ v Victoria Police* [2010] VCAT 255 at [265]

23. The information considered exempt in each of the documents is information provided by third parties to the Agency.
24. I consider it is reasonably likely the third parties provided information to the Agency on a confidential basis. It is evident from information included in the documents that certain third parties requested to remain anonymous. While I do not have specific information regarding the remaining third parties, I consider that, given the sensitivity of the information provided, if consulted, they would more likely than not advise the information was communicated to the Agency in confidence.
25. Therefore, I am satisfied the information provided by the third parties was communicated to the Agency in confidence given the sensitivity of the information and the circumstances in which it was provided.

*Would disclosure of the information be contrary to the public interest?*

26. The fact the information was communicated in confidence is not the only consideration in relation to the exemption in section 35(1)(b). I must also consider whether disclosure would be contrary to the public interest as the ability of the Agency to obtain similar information in the future would be impaired if the information is disclosed under the FOI Act.
27. This means I must consider whether, if the information were to be disclosed, others in the position of the communicators would be reasonably likely to be inhibited in providing similar information to mental health triage service.
28. There is a fundamental interest in individuals being able to provide what is often sensitive information about a person to medical staff. In turn, I consider medical staff rely on this information, particularly in the context of crisis assessments.
29. In relation to this case, I accept that if individuals, who provided information to the Agency regarding an individual's mental health, were aware their identity and the information they provide would be disclosed in response to an FOI request, they would be less likely to communicate similar information to the Agency in the future.
30. If individuals are unable to speak frankly and provide information to medical and other hospital staff, the appropriateness and quality of care provided to patients or vulnerable members of the public may be detrimentally affected. Information provided by third parties to medical staff is particularly critical in cases where mental health concerns are raised.
31. On the other hand, I acknowledge the Applicant has a genuine interest in obtaining the information. However, in weighing these two competing priorities, I have determined the need to protect information provided in confidence by third parties to health services is paramount in this instance.
32. I accept the release of the information would likely result in members of the public being less forthcoming with health care services, which in turn may undermine the ability of the Agency, and similar health service providers, to effectively and safely diagnose and treat patients.
33. Accordingly, I am satisfied release of this information would impair the Agency's ability to obtain the same or similar information in the future.
34. The application of section 35(1)(b) to each document is set out in **Annexure A**.

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<sup>5</sup> XYZ v Victoria Police [2010] VCAT 255.

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

35. 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.
36. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'<sup>6</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>7</sup>
37. I have considered the effect of deleting exempt information from the documents. I am satisfied 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***

38. On the information available, I am satisfied the exemptions in sections 33(1) and 35(1)(b) apply to certain information in the document.
39. As it is practicable to edit the documents to delete exempt information, I have determined to grant access to the document in part.
40. The application of this exemption to each document is set out in the schedule at **Annexure A**.

### ***Review rights***

41. 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.<sup>8</sup>
42. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.<sup>9</sup>
43. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.<sup>10</sup>
44. 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.
45. 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>11</sup>

### ***Other matters***

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<sup>6</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 at [82].

<sup>7</sup> *Honeywood v Department of Human Services* [2006] VCAT 2048 [26]; *RFJ v Victoria Police FOI Division (Review and Regulation)* [2013] VCAT 1267 at [140] and [155].

<sup>8</sup> The Applicant in section 50(1)(b) and the Agency in section 50(3D).

<sup>9</sup> Section 52(5).

<sup>10</sup> Section 52(9).

<sup>11</sup> Sections 50(3F) and (3FA).

46. 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.

47. VCAT has held in relation to the meaning of 'practicable' in the FOI Act:

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>12</sup>

48. 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>13</sup>

49. On balance, I am satisfied it is not practicable to notify the third parties of their right of review of my decision to release their personal affairs information.

***When this decision takes effect***

50. 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.

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<sup>12</sup> *Re Schubert and Department of Premier and Cabinet* (2001) 19 VAR 35 at [45].

<sup>13</sup> *Coulston v Office of Public Prosecutions Victoria* [2010] VCAT 1234 at [42].

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
1.	[Date]	Screening Register Detail	4	Released in part Sections 33(1), 35(1)	Released in part Sections 33(1), 35(1)(b), 25  The document is to be released to the Applicant, except for the following information which is to be deleted:  (a) the name, address, phone number, referral source and suburb and postcode under the 'referred from details' heading that is exempt under section 33(1);  (b) the clinician name under 'Screening Details' which is exempt under section 33(1);  (c) the text under the 'Presenting Problem' on page 1 which is exempt under section 35(1)(b);  (d) the last sentence on page 1 under the heading 'Presenting Problem' which is exempt under section 33(1);  (e) the first sentence on page 2 which is exempt under section 33(1);  (f) words 3 to 10 in paragraph 4 on page 2 which is exempt under	Section 33(1): I am satisfied it would be unreasonable to disclose the personal affairs information in this document for the reasons outlined above. However, I am not satisfied the line the Agency redacted under 'perception of problem' on page 1 contains personal affairs information. Accordingly, I have determined it is not exempt under section 33(1).  I am also not satisfied it would be unreasonable to release the identity of certain third party information in the documents. However, I consider it would be unreasonable to release mobile telephone numbers of third parties.  Section 35(1)(b): I am satisfied the information exempted by the Agency under section 35(1)(b) is exempt for the reasons outlined above.  Section 25: I am satisfied it is practicable to delete the exempt information, because it would not require substantial time and effort, and the edited documents would retain meaning.



Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
					<p>section 33(1);</p> <p>(g) the Constable's surname in paragraphs 5, 6 and 7 on page 2 which is exempt under section 33(1);</p> <p>(h) the fourth word contained in paragraph 8 on page 2 which is exempt under section 33(1);</p> <p>(i) the three words following '20:50' in paragraph 9 on page 2 which is exempt under section 33(1);</p> <p>(j) words 2-5 contained in paragraph 24 on page 2 which is exempt under section 33(1);</p> <p>(k) the third paragraph under the heading 'Outcome Comments' on page 3 which is exempt under section 35(1)(b);</p> <p>(l) the name next to the heading 'Acknowledged' on page 3 which is exempt under section 33(1);</p> <p>(m) all clinician names and service recipients on page 3 which is exempt under section 33(1); and</p> <p>(n) both clinician names on page 4 which 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]	Screening Register Detail	3	<p><b>Released in part</b></p> <p>Sections 33(1), 35(1)</p>	<p><b>Released in part</b></p> <p>Sections 33(1), 35(1)(b), 25</p> <p>The document is to be released to the Applicant, except for the following information which is to be deleted:</p> <p>(a) the clinician name under the heading 'Screening Details' on page 1 which is exempt under section 33(1);</p> <p>(b) words 2 to 4 in paragraph 3 under the heading 'Presenting Problem' on page 1 which is exempt under section 33(1);</p> <p>(c) the name and position title contained in the second line in paragraph 3 under the heading 'Presenting Problem' on page 1 which is exempt under section 33(1);</p> <p>(d) words 2 to 4 contained in the fourth paragraph under the heading 'Presenting Problem' on page 1 which is exempt under section 33(1); and</p> <p>(e) the clinician names recorded on page 3 which is exempt under</p>	<p><b>Section 33(1):</b> See comments for Document 1.</p> <p><b>Section 35(1)(b):</b> See comments for Document 1.</p> <p><b>Section 25:</b> See comments for Document 1.</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).	
3	[Date]	Screening Register Detail	2	Released in part Sections 33(1), 35(1)	Released in part Sections 33(1), 35(1)(b), 25  The document is to be released to the Applicant, except for the following information which is to be deleted:  (a) the referral source under the heading 'Referred From Details' on page 1 which is exempt under section 33(1);  (b) the clinician name under the heading 'Screening Details' on page 1 which is exempt under section 33(1);  (c) paragraphs 4 to 6 under the heading 'Presenting Problem' on page 1 which is exempt under section 35(1)(b);  (d) the first name contained in the first line above the heading 'Triage scale' on page 2 which is exempt under section 33(1);  (e) the name next to the heading 'Acknowledged' on page 2 which is exempt under section 33(1); and	Section 33(1): See comments for Document 1.  Section 35(1)(b): See comments for Document 1.  Section 25: See comments for Document 1.

**Annexure 1 – Schedule of Documents**

Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
					the clinician names and service recipients on page 2 which is exempt under section 33(1).	