

Notice of Decision and Reasons for Decision

Applicant:	'AJ3'
Agency:	The Royal Children's Hospital
Decision Date:	22 August 2019
Exemptions considered:	Sections 33(1) and 38 of the <i>Freedom of Information Act 1982</i> (Vic) in conjunction with section 141(2) of the <i>Health Services Act 1988</i> (Vic)
Citation:	'AJ3' and <i>The Royal Children's Hospital (Freedom of Information)</i> [2019] VICmr 84 (22 August 2019)

FREEDOM OF INFORMATION – CCTV footage – hospital – patient – hospital staff – unreasonable disclosure of personal affairs information – secrecy provision

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 a document 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 the document.

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner

22 August 2019

Reasons for Decision

Background to review

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

CCTV footage of the Code Black incident that occurred on [date], where I was physically assaulted by the patient [redacted]
2. In its decision, the Agency identified one document falling within the terms of the Applicant's request. The document is CCTV footage. The Agency decided to refuse access to the document in full.

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) the Agency's decision on the FOI request;
 - (b) information provided with the Applicant's review application;
 - (c) the Agency's submissions dated 18 April and 9 August 2019; and
 - (d) correspondence received from the Applicant dated 14 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 exemptions under sections 33(1) and 38 to refuse access to the document. The Agency's decision letter sets out the reasons for its decision.

Section 33(1) – Documents containing personal affairs information

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;¹ and
 - (b) such disclosure would be unreasonable.

¹ Sections 33(1) and (2).

Does the document contain personal affairs information?

10. Information will relate to the 'personal affairs' of a person if it is reasonably capable of identifying them, or of disclosing their address or location.² It has also been held information relates to a person's personal affairs if it 'concerns or affects that person as an individual'.³
11. The Victorian Civil and Administrative Tribunal (VCAT) held a document will disclose personal affairs information if it is capable, either directly or indirectly, of identifying a particular individual whose personal affairs are disclosed. Further, as disclosure under the FOI Act is not subject to restriction or condition, this is to be interpreted by the capacity of any member of the public to potentially identify a third party.⁴
12. VCAT has also noted CCTV footage may disclose the personal affairs of persons other than an FOI applicant even if it does not show the faces of those third parties. An individual may be capable of being identified by what they were wearing or what they were doing.⁵
13. The CCTV footage is captured from inside the Agency. The footage is in colour, is 16 minutes in duration and depicts several staff members, including the Applicant, and a patient during a 'Code Black' incident. The footage contains the facial features, gait and clothing of Agency staff (including the Applicant) and the patient attending the Agency.
14. I consider the quality of the footage is sufficiently clear at various times and to varying degrees to show identifying features of the individuals captured in the footage.
15. I am satisfied the identities of the individuals, whose images appear in the footage, are reasonably capable of being identified by persons with knowledge of or involvement in the events to which they relate, or any other member of the public.
16. Accordingly, I am satisfied the CCTV footage contains personal affairs information of persons other than the Applicant.

Would release of the personal affairs information be unreasonable?

17. The concept of 'unreasonable disclosure' involves determining whether the public interest in disclosure of official information is outweighed by the personal interest in privacy.
18. I am satisfied disclosure of the personal information in the document would be unreasonable in the circumstances for the following reasons:

- (a) The nature of the personal affairs information and the circumstances in which the information was obtained

Having viewed the footage as a whole, I am satisfied it is sensitive in nature.

The footage is recorded in the context of a hospital treatment setting and involves the patient and Agency staff.

The nature of the patient's personal affairs information is sensitive as, at the time of the incident, the patient was a child.

² Section 33(9).

³ *Hanson v Department of Education and Training* [2007] VCAT 123 at [9].

⁴ *O'Sullivan v Department of Health and Community Services (No 2)* [1995] 9 VAR 1 at [14]; *Beauchamp v Department of Education* [2006] VCAT 1653 at [42].

⁵ *Wilner v Department of Economic Development, Jobs, Training and Resources* [2015] VCAT 669 at [17].

The footage captures a 'Code Black' critical incident, which means the incident relates to 'armed aggression' involving a patient. Such incidents are serious in nature. In this case, police officers responded to the incident. As such, I consider the footage of the incident is sensitive in nature.

I note it has been held there is nothing particularly sensitive about matters occurring or arising in the course of an agency officer's official duties, and disclosure of this type of information is generally considered to not be unreasonable.⁶ While I consider the actions of Agency staff captured in the footage depict them carrying out their professional or official duties, I do not consider the context in which they are captured (ie during a Code Black incident) represents them undertaking their usual or ordinary duties such that disclosure of their personal affairs information would be reasonable.

(b) The Applicant's interest in the information, and whether their purpose for seeking the information is likely to be achieved

The FOI Act provides a general right of access that can be exercised by any person, regardless of their motive or purpose for seeking access to a document. However, the reasons why an applicant seeks access to a document is a relevant consideration in determining whether disclosure would be unreasonable.⁷

In their request for review, the Applicant states the reason for seeking access to the CCTV footage is to assist with their professional development and emotional recovery. I acknowledge the Applicant's private interest in the document and the impact the incident has had upon them.

The footage is visual only and does not contain audio. Therefore, I consider the utility of the footage from a professional development perspective to be reduced.

I consider a meeting with the Agency's workplace health and safety officer or other appropriately qualified person with knowledge of the incident may assist the Applicant in addressing any professional development needs or concerns arising from the incident.

Any legal interest in the document held by the Applicant (such as criminal or civil proceedings arising from the incident) can be served by alternative means of access where the document's use and distribution is controlled by the imposition of conditions or other limitations.

(c) Whether the individuals to whom the information relates object, or would be likely to object, to the release of the information

I do not have any information before me as to the views of the individuals to whom the information relates. The Agency determined it was unreasonable to consult with the individuals for the following reasons:

- (a) Whilst the Agency did not seek a clinical opinion as to the ramifications of notification in respect of the patients' health, in light of the nature of the events captured and that a report was made to police, notifying the patient would be reasonably likely to cause undue stress and anxiety.
- (b) The nature of the incident and the involvement of police has already made this a traumatic event for Agency staff involved. Notification and the ramifications of public

⁶ See *Milthorpe v Mt Alexander Shire Council* [1996] VCAT 368.

⁷ *Victoria Police v Marke* [2008] VSCA 218 at [104].

disclosure of the CCTV footage would be reasonably likely to cause further undue stress, anxiety and distress to the staff involved.

- (c) In light of the nature of the incident, notification would need to be undertaken in a sensitive manner. A notification letter alone would not be appropriate in the circumstances.

I accept the Agency's submission that CCTV footage is captured by the Agency for the purposes of staff and patient safety and to detect wrongdoing.

I accept the patient may not have known – or may not have been in a state to know the relevant areas were under surveillance. Whilst I consider it highly likely Agency staff were aware the relevant areas were under surveillance, I accept all individuals captured in the footage would expect the footage would not be disclosed under the FOI Act without restriction or conditions.⁸

Having regard to the nature and circumstances of the creation of the document, I am of the view the individuals, whose personal information is captured in the footage, would be reasonably likely to object to the release of the information for reasons other than law enforcement or health and safety purposes.

19. Accordingly, I am satisfied the document is exempt from disclosure under section 33(1).

Section 38 – Documents to which secrecy provisions apply

20. A document is exempt under section 38 if:

- (a) there is an enactment in force;
- (b) that applies specifically to the kind of information in the document; and
- (c) the enactment must prohibit persons, referred to in the enactment, from disclosing that specific kind of information (either absolutely or subject to exceptions or qualifications).

21. In order for section 38 to apply, the enactment must be formulated with such precision that it specifies the actual information sought to be withheld.

22. The Agency applied section 38 of the FOI Act in conjunction with section 141(2) of the *Health Services Act 1988* (Vic) (**Health Services Act**).

23. Section 141 of the Health Services Act provides:

141 Confidentiality

- (1) In this section— **relevant person** means—

- (a) a relevant health service;

...

relevant health service means—

⁸ See *Willner v Department of Economic Development, Jobs, Training and Resources (Review and Regulation)* [2015] VCAT 669 at [22]-[25].

(a) a public hospital or denominational hospital;

...

(2) A relevant person must not, except to the extent necessary—

(a) to carry out functions under this or any other Act; or

(b) to exercise powers under this or any other Act in relation to a relevant health service; or

(c) to give any information he or she is expressly authorised, permitted or required to give under this or any other Act—

give to any other person, whether directly or indirectly, any information acquired by reason of being a relevant person if a person who is or has been a patient in, or has received health services from, a relevant health service could be identified from that information.

Penalty: 50 penalty units.

24. Sections 141(2B) and 141(3) of the Health Services Act provide for exceptions to the prohibition under section 141(2).

Is there an enactment in force?

25. I am satisfied the Health Services Act is an enactment in force for the purposes of section 38.

Does the enactment apply specifically to the kind of information in the document?

26. Noting section 141 of the Health Services Act and having viewed the CCTV footage, I am satisfied the footage was acquired by the Agency, which is a 'relevant health service'.

27. The footage depicts several Agency staff and the patient who was receiving health services from the Agency, despite the fact the footage captures a 'Code Black' incident.

28. I consider the quality of the footage is sufficiently clear at various times and to varying degrees to show identifying features of the patient captured in the footage, such as their facial features, gait and attire. As such, I am satisfied the patient is identified in, or could be identified from, the footage.

29. I am satisfied the enactment applies specifically to the kind of information in the document.

Does the enactment prohibit persons from disclosing the information in the document?

30. I am satisfied section 141(2) prohibits the Agency from disclosing information in the CCTV footage where that information identifies the patient.

31. Disclosure of information in breach of section 141(2) of the Health Services Act attracts a financial penalty, which highlights the legislature's intention that such information should remain confidential.

32. For completeness, I am satisfied disclosure of the CCTV footage in this case does not fall within any of the purposes in section 141(2). Further, having reviewed the exceptions to the prohibition on disclosure in sections 141(2B) and 141(3) of the Health Services Act, I do not consider any of the exceptions in these sections are applicable in this case.

33. Accordingly, I am satisfied the CCTV footage identifies the patient and, therefore, disclosure of the document is prohibited under section 141(2) of the Health Services Act and is exempt under section 38 of the FOI Act.

Deletion of exempt or irrelevant information

34. 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.
35. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'⁹ 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 25.¹⁰
36. Having reviewed the CCTV footage, I am satisfied it would not be practicable for the document to be edited so as to remove the exempt information given the number of individuals captured, the significant amount of movement of those individuals and the degree of pixilation required to render the individuals non-identifiable. Further, I accept the Agency's submission that editing the footage to remove the exempt information would render the document meaningless.

Conclusion

37. On the information available, I am satisfied the document is exempt under sections 33(1) and 38 in conjunction with section 141(2) of the Health Services Act. As it is not practicable to edit the document to delete exempt information, I have decided to refuse access to the document in full.

Review rights

38. If either party to this review is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.¹¹
39. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹²
40. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹³
41. 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.
42. 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.¹⁴

When this decision takes effect

43. 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.

⁹ *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].

¹⁰ *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].

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

¹² Section 52(5).

¹³ Section 52(9).

¹⁴ Sections 50(3F) and (3FA).