

## Notice of Decision and Reasons for Decision

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Applicant:	'AR4'
Agency:	Eastern Health
Decision Date:	12 November 2019
Exemptions considered:	Sections 33(1), 35(1)(b)
Citation:	'AR4' and Eastern Health ( <i>Freedom of Information</i> ) [2019] VICmr 158 (12 November 2019)

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FREEDOM OF INFORMATION – medical records – personal affairs information – unreasonable disclosure – information obtained by third parties in confidence – disclosure contrary to the public interest

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.

I am satisfied certain information in the documents is exempt under sections 33(1) and 35(1)(b).

As I am satisfied it is practicable to release an edited copy of the documents in accordance with section 25, I have determined to grant access to the documents in part.

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  
12 November 2019

## Reasons for Decision

### Background to review

1. The Applicant made a request to the Agency for access to their full medical record.
2. In its decision dated 16 May 2019, the Agency identified 328 pages falling within the terms of the Applicant's request. It decided to release 315 pages in full and 10 pages 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. Accordingly, this review relates to the 10 documents to which the Agency granted partial access.
5. I have examined copies of the documents subject to review.
6. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
7. I have considered all communications received from the parties, including:
  - (a) the Agency's decision on the FOI request dated 16 May 2019;
  - (b) information provided with the Applicant's review application;
  - (c) the Agency's submission dated 25 October 2019; and
  - (d) all communications between OVIC and the Agency and the Applicant.
8. 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

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

### *Section 33(1)*

10. 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'.

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

*Does the information constitute 'personal affairs information'?*

11. 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>
12. A third party's opinion or observations about another person's conduct has been held to constitute information related to the personal affairs of a third party.<sup>3</sup>
13. The phrase 'personal affairs information' has been interpreted broadly, and includes matters related to the health, private behaviour, home life or personal or family relationships of individuals.<sup>4</sup>
14. The information exempted by the Agency under section 33(1) includes:
  - (a) a mobile phone number of an Agency staff member;
  - (b) the opinions and observations of Agency staff and a third party or third parties (**third parties**) in relation to the Applicant; and
  - (c) the names and other identifying information of a third party.
15. I am satisfied the above information is 'personal affairs information' for the purposes of section 33(1).

*Would release of the personal affairs information be unreasonable?*

16. 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 circumstances of a particular matter.
17. Section 33(2B) requires that in deciding whether the disclosure of a document under the FOI Act would involve unreasonable disclosure of information relating to the personal affairs on any person (including a deceased person), an agency must:
  - (a) notify the person who is subject of the information (or if that person is deceased, that person's next of kin) that the agency has received a request for access to the document;
  - (b) seek that person's view as to whether disclosure of the document should occur; and
  - (c) state that if the person consents to disclosure of the document, or disclosure subject to deletion of information relating to the personal affairs of the person, the person is not entitled to apply to the VCAT for review of the decision to grant access to that document.
18. In this instance, following third party consultation, the Agency advised OVIC the third parties did not consent to the release of their personal affairs information in the documents.
19. In determining whether release of the personal affairs information is unreasonable in the circumstances, I have given weight to the following factors:
  - (a) the nature of the personal affairs information (for example, whether it is sensitive or its current relevance);

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<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> *Re F and Health Department* (1988) 2 VAR 458 as quoted in *RJF v Victoria Police FOI Division* [2013] VCAT 1267 at [103].

- (b) the extent to which the information is available to the public;
  - (c) the circumstances in which the information was obtained (for example, whether it was obtained involuntarily or in confidence);
  - (d) the Applicant's interest in the information, including their purpose or motive for seeking access to the documents;
  - (e) whether any public interest would be promoted by disclosure;
  - (f) the likelihood of further disclosure of the information if it is released;
  - (g) whether any third parties, to whom the information relates, consent or object to the disclosure;
  - (h) whether disclosure would cause any person stress, anxiety or embarrassment; and
  - (i) 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.
20. I have also taken into consideration the nature of disclosure 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>5</sup>
21. I am also required to consider section 33(2A) in determining if release of a third party's personal affairs information would be unreasonable. This provision requires me to consider whether disclosure of information would, or would be reasonably likely to, endanger the life or physical safety of any person. In my view, there are reasonable grounds to consider that concerns exist about the effect of disclosure on the safety of third parties.
22. Having reviewed the documents subject to review, I am satisfied it would be unreasonable to release certain third parties' personal affairs information, in light of the following factors:
- (a) The information provided to the Agency is sensitive and personal in nature.<sup>6</sup>
  - (b) The information was provided to the Agency with an expectation of privacy. I have formed this view given the sensitivity of the information provided and the fact that two third parties objected to the release of such information.
  - (c) The information provided to the Agency has not been aired in public and the information is not in the public domain.
  - (d) The Applicant's interest in obtaining the information is a matter of private interest. I do not consider any public interest would be promoted by disclosure of third parties' personal affairs information to the Applicant. I am of the view there is a greater public interest in the Agency preserving the privacy of third parties in this circumstance.
23. While I acknowledge the Applicant has a genuine interest in seeking access to the documents subject to review, I have determined the need to protect certain sensitive and confidential information provided by third parties to the Agency outweighs the Applicant's personal interest in obtaining access to this information.

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<sup>5</sup> *Victoria Police v Marke* [2008] VCSCA 218 at [68].

<sup>6</sup> *Page v Metropolitan Transit Authority* [1988] 2 VAR 243 at [246].

24. Accordingly, I have determined disclosure of certain personal affairs information in the documents would be unreasonable and such information is exempt under section 33(1).
25. However, having carefully reviewed the documents, I have determined that while it would be unreasonable to release certain personal affairs information, in some instances, I consider disclosure of certain information to the Applicant would not be unreasonable in the circumstances, given information of a similar nature was released to the Applicant by the Agency.
26. The Schedule of Documents in **Annexure A** summarises my decision in relation to section 33(1) and each document.

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

27. 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?*

28. 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>
29. The information exempted by the Agency under section 35(1)(b) includes information that was voluntarily provided to the Agency by a person or persons.
30. This information was received by Agency officers in the course of providing medical treatment to the Applicant.
31. Having considered the objections of the relevant third party or third parties to the release of information, as well as having regard to the circumstances in which the information was provided (being in relation to the provision of medical treatment and health care to the Applicant), I am satisfied it was communicated in confidence to the Agency.

*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?*

32. Section 35(1)(b) also requires I consider whether the Agency would be impaired from obtaining similar information in the future if the information is disclosed under the FOI Act.
33. This means, I must be satisfied that, if the information were to be disclosed, others in the position of the communicators would be reasonably likely not to provide similar information to the Agency in the future.
34. In its decision letter, the Agency advised it would be contrary to the public interest to release the information as it would constitute a breach of confidentiality and would likely inhibit other people from making reports or providing similar information to the Agency in the future.

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<sup>7</sup> Ibid, XYZ at [265].

<sup>8</sup> Ibid.

35. In this case, I accept that, in its capacity as a healthcare provider, the Agency relies on confidential information provided by third parties to plan and provide effective medical treatment and health care to patients. Such information, by its very nature, is generally highly personal, sensitive and confidential.
36. I consider there is an essential public interest in individuals being able to provide what is often sensitive and confidential information to the Agency. Where this occurs, members of the public need to feel confident the information they provide, including their identity, will be held in confidence by the Agency.<sup>9</sup>
37. Further, I am of the view if these individuals were aware their identity and the information they provide in confidence would be disclosed in response to an FOI request, they would be less likely to communicate similar information to the Agency in the future. I consider this is a significant and detrimental outcome for the Agency who relies on receiving confidential information to provide timely and necessary treatment or intervention to its patients.
38. Furthermore, section 35(1)(b) is concerned with protecting the public interest in the free flow of information between agencies and individuals upon whom information it relies. In the context of the Agency, being a healthcare provider, the voluntary provision of sensitive information is often vital to the Agency's ability to effectively discharge its medical treatment and health care functions.
39. On the other hand, I acknowledge the Applicant has a genuine interest in obtaining full access to [their] medical record. However, in weighing these two competing priorities, I have determined the need to protect sensitive information provided by third parties' in confidence to the Agency outweighs the Applicant's personal interest in obtaining this information.
40. For these reasons, I am satisfied the release of certain confidential information would likely result in individuals being less forthcoming with healthcare providers in the future. I consider this to be a significant and detrimental outcome for healthcare providers who, at times, rely on such information to be provided so as to effectively diagnose and treat patients.
41. However, having carefully reviewed the documents and the nature of information already released to the Applicant, I have determined while certain information was provided to the Agency in confidence, its disclosure to the Applicant in some circumstances would not impair the Agency's ability to obtain similar information in the future.
42. The Schedule of Documents in **Annexure 1** summarises my decision in relation to section 35(1)(b) with respect to each document.

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

43. 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 a copy.
44. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'<sup>10</sup> and the effectiveness of the deletions. Where deletions would render a document meaningless, they are not 'practicable', and release of the document will not be required under section 25.<sup>11</sup>

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<sup>9</sup> See *Maki v Alfred Hospital*, unreported, VCAT, Davis M, 19 April 2002.

<sup>10</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>11</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].

45. I have considered the effect of deleting exempt information from the documents. In my view, it is practicable to delete such information as to do so would not require substantial time and effort, and the edited document would retain meaning.

### **Conclusion**

46. I am satisfied certain information in the documents is exempt under sections 33(1) and 35(1)(b).
47. As I am satisfied it is practicable to release an edited copy of the documents in accordance with section 25, I have determined to grant access to the documents in part.
48. The Schedule of Documents in **Annexure 1** sets out my decision in relation to each document.

### **Review rights**

49. 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>12</sup>
50. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.<sup>13</sup>
51. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.<sup>14</sup>
52. 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.
53. 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>15</sup>

### **Other matters**

54. 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.
55. 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>16</sup>

56. VCAT also considers the possibility of an unnecessary intrusion into the lives of the third parties is relevant when assessing the practicability of notifying them.<sup>17</sup>
57. 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.

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<sup>12</sup> The Applicant in section 50(1)(b) and the Agency in section 50(3D).

<sup>13</sup> Section 52(5).

<sup>14</sup> Section 52(9).

<sup>15</sup> Sections 50(3F) and (3FA).

<sup>16</sup> *Re Schubert and Department of Premier and Cabinet* (2001) 19 VAR 35 at [45].

<sup>17</sup> *Coulston v Office of Public Prosecutions Victoria* [2010] VCAT 1234 at [42].

***When this decision takes effect***

58. 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]	Discharge Summary	3	Released in part  Sections 33(1), 35(1)(b)	Released in part  Sections 33(1), 35(1)(b), 25	<p><b>Section 33(1):</b> I am satisfied the release of the third parties' personal affairs information would be unreasonable in the circumstances. Accordingly, this information is exempt under section 33(1).</p> <p><b>Section 35(1)(b):</b> I am satisfied the information provided to Agency's officers by third parties was communicated in confidence and disclosure of the information would be contrary to the public interest as it would reasonably impair the ability of the Agency to obtain similar information in the future. Accordingly, this information is exempt under section 35(1)(b).</p> <p><b>Section 25:</b> I am satisfied it is practicable to delete exempt information from the documents as to do so would not require substantial time and effort, and the edited document would retain meaning.</p>
2.	[Date]	Orders	1	Released in part  Section 33(1)	Released in part  Section 33(1), 25	<p><b>Section 33(1):</b> See comments for Document 1.</p> <p><b>Section 25:</b> See comments for Document 1.</p>
3.	[Date]	Assessment Forms	2	Released in part  Sections 33(1), 35(1)(b)	Released in part  Sections 33(1), 35(1)(b), 25	<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>

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
4.	[Date]	Doctor Documentation	1	Released in part  Sections 33(1), 35(1)(b)	Released in part  Sections 33(1), 35(1)(b), 25	Section 33(1): See comments for Document 1.  Section 35(1)(b): See comments for Document 1.  Section 25: See comments for Document 1.
5.	[Date]	Nursing Documentation	2	Released in part  Sections 33(1), 35(1)(b)	Released in part  Sections 33(1), 35(1)(b), 25	Section 33(1): See comments for Document 1.  Section 35(1)(b): See comments for Document 1.  Section 25: See comments for Document 1.
6.	[Date]	Consultation Responses	3	Released in part  Sections 33(1), 35(1)(b)	Released in part  Sections 33(1), 35(1)(b), 25  The document is to be released to the Applicant, as per the Agency's original decision, with the additional release of the following information:  (a) the last five lines on page 1 under 'limited note due to time restraints.'	Section 33(1): I am satisfied the release of the third parties' personal affairs information would be unreasonable in the circumstances. Accordingly, this information is exempt under section 33(1). However, I am not satisfied the last five lines on page 1 under 'limited note due to time restraints' contains personal affairs information of third parties, but rather concerns the Applicant's personal affairs information.  Section 35(1)(b): I am satisfied the information provided to Agency's officers by third parties was communicated in confidence and disclosure of the information would be contrary to the public interest as it would reasonably impair the ability of the Agency to obtain similar information in the future. Accordingly, this information is exempt under section 35(1)(b).

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
						However, I am not satisfied the last five lines on page 1 under 'limited note due to time restraints' contains confidential information.  Section 25: See comments for Document 1.
7.	[Date]	MH Clinical Risk Screening & Ongoing Assessment	1	Released in part  Sections 33(1), 35(1)(b)	Released in part  Sections 33(1), 35(1)(b), 25	Section 33(1): See comments for Document 1.  Section 35(1)(b): See comments for Document 1.  Section 25: See comments for Document 1.
8.	[Date]	Social Work Psychosocial Assessment	2	Released in part  Sections 33(1), 35(1)(b)	Released in part  Sections 33(1), 35(1)(b), 25	Section 33(1): See comments for Document 1.  Section 35(1)(b): See comments for Document 1.  Section 25: See comments for Document 1.
9.	[Date]	Screening Register Detail	2	Released in part  Sections 33(1), 35(1)(b)	Released in part  Sections 33(1), 35(1)(b), 25	Section 33(1): See comments for Document 1.  Section 35(1)(b): See comments for Document 1.  Section 25: See comments for Document 1.
10.	[Date]	Screening Register Detail	2	Released in part  Sections 33(1), 35(1)(b)	Released in part  Sections 33(1), 35(1)(b), 25	Section 33(1): I am satisfied the release of the third parties' personal affairs information would be unreasonable in the circumstances. Accordingly, this information is exempt under section 33(1). However, I am not satisfied the two words next to 'Service Recipient:' on page 2

**Annexure 1 – Schedule of Documents**

Document No.	Date of Document	Document Description	Number of Pages	Agency’s Decision	OVIC Decision	OVIC Comments
						contain personal affairs information. Section 35(1)(b): See comments for Document 1. Section 25: See comments for Document 1.