

Notice of Decision and Reasons for Decision

Applicant:	'AS9'
Agency:	Barwon Health
Decision date:	22 November 2019
Exemption considered:	Section 35(1)(b)
Citation:	'AS9' and Barwon Health (<i>Freedom of Information</i>) [2019] VICmr 172 (22 November 2019)

FREEDOM OF INFORMATION – medical records – 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 is the same as the Agency's decision in that I have decided to release 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

22 November 2019

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency for access to their full medical records.
2. In its decision, dated 20 June 2019, the Agency identified 967 pages falling within the terms of the Applicant's request. It decided to release 934 pages in full, 50 pages in part and refuse access to 17 pages in full. The Agency relied on the exemptions in 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.

Review

3. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
4. On 10 October 2019, the Applicant advised they do not seek access to the personal affairs information of third parties. Therefore, personal affairs information in the documents is not subject to review.
5. Accordingly, my review concerns the Agency's decision to refuse access those documents exempted in part under section 35(1)(b) only.
6. I have examined copies of the documents subject to review.
7. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
8. I have considered all communications and submissions received from the parties, including:
 - (a) the Agency's decision, dated 20 June 2019;
 - (b) the Applicant's submission, dated 10 October 2019, and information provided with the Applicant's review application;
 - (c) the Agency's submission, dated 21 August 2019; and
 - (d) all communications between OVIC and the Agency and the Applicant.
9. 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 section 35(1)(b)

10. 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.
11. In summary, section 35(1)(b) is concerned with protecting the public interest in the free flow of information provided in confidence between an individual and an agency.

Was the information or matter communicated in confidence?

12. When determining whether information was communicated in confidence, it is necessary to consider the position from the perspective of the communicator.¹ Further, confidentiality can be expressed or implied from the circumstances of the matter.²
13. The information exempted by the Agency under section 35(1)(b) includes information voluntarily provided to the Agency, by a person or persons, in the course of the Agency providing medical treatment to the Applicant.
14. Accordingly, I am satisfied the information was communicated to the Agency in confidence. This view considers of the sensitive nature of the information and the circumstances in and purpose for which it was provided 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?

15. The second condition to be met before section 35(1)(b) will apply to information communicated in confidence is that disclosure would be contrary to the public interest as it would be reasonably likely to impair the ability of the agency from obtaining similar information in the future.
16. This means I must be satisfied, if the information were to be disclosed, it would impair the ability of the Agency to obtain similar information in the future. For example, others in the position of the communicator or communicators would be reasonably likely to not provide similar information to the Agency in the future.
17. In its submission, dated 21 August 2019, the Agency submitted 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.
18. I accept such information where it relates to a patient receiving medical treatment and healthcare by the Agency, by its very nature, will generally be personal and sensitive.
19. I am satisfied there is an essential public interest in individuals being able to provide information of this nature to the Agency.
20. Where it is beneficial or necessary for information of this nature to be disclosed to the Agency, I am of the view members of the public need to feel confident the information they provide, including their identity or identifying information, will be held in confidence by the Agency.³
21. I am of the view if such individuals were aware their identity and 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 would be a significant and detrimental outcome for the Agency, which relies on receiving such information to provide timely and necessary medical treatment and health services to patients.
22. In the context of the Agency, being a healthcare provider, the voluntary provision of personal and sensitive information in a clinical context is necessary for the Agency to be able to effectively discharge its medical and healthcare functions. Importantly, I also consider the withholding of such

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

² *Ibid.*

³ See *Maki v Alfred Hospital*, unreported, VCAT, Davis M, 19 April 2002.

information from the Agency would have a detrimental impact on the medical outcomes and wellbeing of its patients.

23. While I acknowledge the Applicant has a genuine interest in obtaining full access to their medical records, in weighing these competing considerations, I consider the need to protect personal and sensitive information provided by a third party to the Agency in confidence for a clinical purpose and in the interests of its patients outweighs the Applicant's personal interest in obtaining this information.
24. Accordingly, I am satisfied the information exempted by the Agency under section 35(1)(b) is exempt.

Deletion of exempt or irrelevant information

25. 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.
26. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'⁴ and the effectiveness of the deletions. Where deletions would render the document meaningless, they are not 'practicable', and release of the document will not be required under section 25.⁵
27. 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

28. On the information before me, I am satisfied the information exempted by the Agency under section 35(1)(b) is exempt.
29. As I am satisfied it is practicable to delete exempt information from the documents in accordance with section 25, I have determined to grant access in part to the documents.
30. The Schedule of Documents in **Annexure 1** sets out my decision in relation to each document.

Review rights

31. 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.⁶
32. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.⁷
33. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.⁸
34. 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.

⁴ *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].

⁵ *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].

⁶ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

⁷ Section 52(5).

⁸ Section 52(9).

35. 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.⁹

When this decision takes effect

36. 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 Sections 50(3F) and (3FA).

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
1.	[Date]	Medical Records	112	Released in part Sections 33(1), 35(1)(b)	Released in part Sections 35(1)(b), 25	<p>Section 25: 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> <p>Section 33(1): During the review, the Applicant advised they do not seek access to the personal affairs information of third parties. Therefore, personal affairs information exempted by the Agency under section 33(1) was not subject to review and should be deleted in accordance with section 25.</p> <p>Section 35(1)(b): For the reasons discussed above, I am satisfied the information exempted by the Agency under section 35(1)(b) is exempt and should be deleted in accordance with section 35(1)(b).</p>