

Notice of Decision and Reasons for Decision

Applicant:	'AV9'
Agency:	Eastern Health
Decision date:	12 December 2019
Exemptions considered:	Sections 33(1), 35(1)(b)
Citation:	'AV9' and Eastern Health (<i>Freedom of Information</i>) [2019] VICmr 199 (12 December 2019)

FREEDOM OF INFORMATION – complaints about applicant – complaints about staff conduct – not practicable to remove exempt information

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.

I am satisfied the documents are exempt under sections 33(1) and 35(1)(b).

As I have determined it would not be practicable to provide the Applicant with an edited copy of the documents in accordance with section 25, the documents are exempt in full.

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 December 2019

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency for access to the following documents:
 1. Complaint made by [named person] about our client on [date]; and
 2. Complaint made by [second named person] about our client on [date];
2. In its decision, the Agency identified three documents within the scope of the Applicant's request. The Agency decided to refuse access to the documents 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. The Applicant advised they do not require the personal affairs information of other people, including names, phone numbers, email addresses or other identifiable information. The Applicant advised they would like access to the contents of complaints made about them.
5. I have considered all communications and any submissions received from the parties, including:
 - (a) the Agency's decision on the FOI request; and
 - (b) information provided with the Applicant's review application.
6. 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

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

Section 33(1)

8. 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'.
9. 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.²
10. The concept of 'unreasonable disclosure' involves balancing the public interest in the disclosure of official information with the personal interest in privacy in the circumstances of a matter.

¹ Sections 33(1) and (2).

² Section 33(9).

11. Section 33(2A) requires, 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 disclosure of the information would, or would be reasonably likely to, endanger the life or physical safety of any person. I do not consider this to be a relevant factor in the circumstances.
12. In deciding whether disclosure of a document would involve the unreasonable disclosure of a third party's personal affairs information, an agency must notify that person that an FOI request has been received for documents containing their personal information and seek their views on disclosure of the document.³ However, this obligation does not arise if:
 - (a) the notification would be reasonably likely to endanger the life or physical safety of a person, or cause them undue distress, or is otherwise unreasonable in the circumstances;
 - (b) the notification would be reasonably likely to increase the risk to the safety of a person experiencing family violence; or
 - (c) it is not practicable to do so.⁴
13. The Agency advised OVIC it decided it was not practicable to consult with the third parties.

Do the documents contain personal affairs information about a person other than the applicant?

14. Document 1 contains a small amount of personal affairs information relating to the Applicant only. However, the majority of personal affairs information in the document relates to persons other than the Applicant.
15. Documents 2 and 3 contain the personal affairs information of persons other than the Applicant.
16. The personal affairs information is:
 - (a) the names, position titles, and contact details of Agency staff;
 - (b) personal affairs information relating to a patient of the Agency, including their name and medical information; and
 - (c) personal affairs information provided to the Agency by members of the public. This includes their names as well as their personal accounts of certain events.
17. I note the Applicant is not seeking the personal affairs information of other people, including names, phone numbers, email addresses or other identifiable information. Therefore, this information is irrelevant to the request and I must decide whether it would be unreasonable to disclose the remaining personal affairs information, being the personal accounts and concerns raised with the Agency about the Applicant by third parties.

Would disclosure of the personal affairs information be unreasonable?

18. In deciding whether disclosure would be unreasonable, I have taken the following factors into consideration:

³ Section 33(2B).

⁴ Section 33(2C).

- (a) the nature of the personal affairs information;
- (b) the circumstances in which the information was obtained by the Agency;
- (c) the Applicant's interest in the information (including their purpose for seeking access to the document); and
- (d) whether the individuals to whom the information relates object or would be likely to object to the release of the information.

19. I have decided it would be unreasonable to release this information, for the following reasons:

- (a) The information was obtained by the Agency in the course of providing treatment to a patient. In these circumstances, I consider the information was provided with the expectation of confidentiality. As such, I consider the information to be confidential and sensitive.
- (b) It follows that the individuals who provided the information to the Agency would be reasonably likely to object to the disclosure of the information.
- (c) I consider, when it comes to the detail of the information provided by the two individuals concerned to the Agency, that amounts to the personal affairs information of those people and not that of the Applicant;
- (d) While I note the Applicant's interest in seeking the information, I must also consider the privacy of the other individuals involved.
- (e) On balance, I am of the view the privacy of the individuals who provided the information outweighs any public interest in disclosure in the particular circumstances of the matter.

20. I have considered whether the personal affairs information could be deleted from the documents so that they could be released in part to the applicant in accordance with section 25.

21. In my view, the information the applicant is specifically seeking is exempt from release under section 33(1). I therefore have decided it is not practicable to delete the exempt information from the documents.

Section 35(1)(b)

22. 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.

23. The Agency advised OVIC it decided it was not practicable to consult with third parties.

Was the information or matter communicated in confidence?

24. When determining whether information was communicated in confidence, it is necessary to consider the position from the perspective of the communicator.⁵ Further, confidentiality can be expressed or implied from the circumstances of the matter.⁶

⁵ *XYZ v Victoria Police (General)* [2010] VCAT 255 at [265].

⁶ *Ibid.*

25. The information exempted by the Agency under section 35(1)(b) includes information voluntarily provided to the Agency in the course of the Agency providing medical treatment to a third party.
26. Having reviewed the information, I am satisfied it was communicated to the Agency in confidence. This view is based on the sensitive nature of the information and the circumstances and purpose for which it was provided by third parties 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?

27. The second condition to be met before section 35(1)(b) will apply to information communicated in confidence is disclosure would 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.
28. 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 would be reasonably likely not to provide similar information to the Agency in the future.
29. In its decision, the Agency stated it would be contrary to the public interest to release the information as it is likely that other people in the future will not provide similar information regarding a person they are concerned about. The Agency advised this would be contrary to the public interest as it may mean a person in its care does not receive the care they need.
30. I am satisfied there is an essential public interest in individuals being able to provide information of this nature to the Agency.
31. 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 personal accounts of event, or their concerns about the treatment provided to a person, will be held in confidence by the Agency.⁷
32. In my view, if such individuals were aware their identity and information they provide in confidence were to 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.
33. 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 information from the Agency would have a detrimental impact on the medical outcomes and wellbeing of its patients.
34. While I acknowledge the Applicant's personal interest in obtaining further information regarding complaints made to the Agency, I consider the need to protect personal and sensitive information provided by a person or persons 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.
35. Accordingly, I am satisfied the information deleted by the Agency under section 35(1)(b) is exempt.

⁷ See *Maki v Alfred Hospital*, unreported, VCAT, Davis M, 19 April 2002.

Deletion of exempt or irrelevant information

36. 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.
37. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'⁸ 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 25.⁹
38. Having reviewed the content of the documents, I am not satisfied it would be practicable to provide the Applicant with an edited copy of the documents in accordance with section 25, as deleting the exempt information would render the documents meaningless and remove the information specifically sought by the Applicant.

Conclusion

39. On the information before me, I am satisfied the documents are exempt under sections 33(1) and 35(1)(b).
40. As I have determined it would not be practicable to provide the Applicant with an edited copy of the documents in accordance with section 25, the documents are exempt in full.

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.¹⁰
42. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹¹
43. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹²
44. 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.
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.¹³

When this decision takes effect

46. 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.

⁸ *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].

⁹ *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].

¹⁰ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

¹¹ Section 52(5).

¹² Section 52(9).

¹³ 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
1.	[Date]	Social work note	2	Refused in full Sections 33(1), 35(1)(b)	Refused in full Sections 33(1), 35(1)(b)
2.	[Date]	Email from a member of the public to the Agency	1	Refused in full Sections 33(1), 35(1)(b)	Refused in full Sections 33(1), 35(1)(b)
3.	[Date]	Email from a member of the public to the Agency	1	Refused in full Sections 33(1), 35(1)(b)	Refused in full Sections 33(1), 35(1)(b)