

Notice of Decision and Reasons for Decision

Applicant:	'AW2'
Agency:	Eastern Health
Decision date:	17 December 2019
Exemptions considered:	Sections 33(1), 35(1)(b)
Citation:	'AW2' and Eastern Health (<i>Freedom of Information</i>) [2019] VICmr 201 (17 December 2019)

FREEDOM OF INFORMATION – medical records – documents affecting personal privacy of third parties – material obtained in confidence from third parties

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.

I am satisfied certain information is exempt under section 35(1)(b). However, I have decided to release additional information to the Applicant where I have determined it is not exempt under the FOI Act.

As I am satisfied it is practicable to provide the Applicant with an edited copy of the documents in accordance with section 25, I have determined to grant access to certain 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
17 December 2019

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency for access to their deceased spouse's (the **patient**) full medical records for a specific admission period.
2. In its decision, the Agency identified documents falling within the terms of the Applicant's request and decided to release certain 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) correspondence from both parties during this review.
7. On [date], the Applicant's representative advised they do not seek access to emails and mobile telephone number of Agency staff and other staff from external agencies. As such, this information falls outside of the scope of this review.
8. Accordingly, my review relates to three documents released to the Applicant in part.
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 exemptions

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

Section 35(1)(b)

11. 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 to the Agency?

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 express 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 by a third party in the course of the Agency providing medical treatment to the patient.
14. Having reviewed the information, I am satisfied certain information was likely communicated to the Agency in confidence. This view is based on the relatively sensitive nature of the information and the circumstances and purpose for which it was provided by the third parties to the Agency.
15. However, I am not satisfied certain information deleted by the Agency in Documents 1 and 2 contains information communicated to the Agency in confidence, as it is information communicated to a third party by the Agency in relation to the patient's treatment. Accordingly, on the information before me, I am not satisfied this information is exempt under section 35(1)(b).

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?

16. The second condition to be met under section 35(1)(b) is that disclosure of the information 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.
17. 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.
18. In its decision, the Agency states:

The information considered to be exempt under section 35(1)(b) is information communicated to our service by a persons (sic) concerned about [the patient's] welfare. This information appears to have been given in confidence. If we disclose this type of information, it is likely that other people in the future will not provide similar information in connection with the person they are concerned about. This would be contrary (harmful) to the public interest, and may mean that the person does not get the care they need at that time.

19. 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.
20. I am satisfied there is an essential public interest in individuals being able to provide information of this nature to the Agency.
21. 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 information they provide to the Agency, including their identity or identifying information, will be held in confidence.³
22. In my view, if individuals were aware their identity and information they provide to the Agency 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

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

² *Ibid.*

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

and detrimental outcome for the Agency, which relies on receiving such information to provide timely and necessary medical treatment and health services to patients.

23. 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.
24. While I acknowledge the Applicant has a genuine interest in obtaining full access to their spouse's medical records, in weighing these competing considerations, I consider the need to protect personal and sensitive information provided in confidence to the Agency by third parties, in the interests of a patient's healthcare and wellbeing, outweighs the Applicant's personal interest in obtaining access to this information.
25. Accordingly, I am satisfied certain information deleted by the Agency under section 35(1)(b) is exempt.
26. The Schedule of Documents in **Annexure 1** summarises my decision in relation to section 35(1)(b) with respect to each document.
27. As I have decided certain information in Documents 1 and 2 is not exempt under section 35(1)(b), I have considered the application of section 33(1) to these documents.

Section 33(1)

28. 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;⁴ and
 - (b) such disclosure would be 'unreasonable'.

Does the document contain personal affairs information of individuals other than the Applicant?

29. 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.⁵
30. I am satisfied the documents contain the following 'personal affairs' information:
 - (a) the name of a third party;
 - (b) other information capable of identifying a third party.
31. I am not satisfied lines 18 to 20 on 'Page 414' in Document 1 contain personal affairs information. Accordingly, this information is not exempt under section 33(1).

Is disclosure of the third party's personal affairs information unreasonable?

32. 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.

⁴ Sections 33(1) and (2).

⁵ Section 33(9).

33. In determining whether disclosure of personal affairs information in the documents would be unreasonable, I have considered the following factors:

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

While the personal affairs information was obtained by the Agency from a third party in the context of providing medical treatment to the patient, there is no information before me to suggest the personal affairs information is particularly sensitive in the circumstances of this matter. Accordingly, this factor weighs in support of disclosure.

(b) The likelihood of further disclosure of information, if released

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 as they choose.⁶ Accordingly, I must consider the likelihood and potential effects of further dissemination of a third party's personal affairs information, if released.

In this matter, there is no information before me to suggest the information will be disseminated by the Applicant. This factor weighs in support of disclosure.

(c) Whether any public interest would be promoted by release of the information

I do not consider there is a broader public interest that would be promoted by releasing the personal affairs information of the third party in this instance. I consider the Applicant's interest in the information would serve a personal interest only.

Generally, I consider there is a public interest in the Agency preserving the privacy of individuals. However, in considering the context and nature of information in the documents, I am not satisfied it would be contrary to the public interest to release the information. This factor weighs in support of disclosure.

(d) 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 information before me as to the third party's views on disclosure of their personal information, as the Agency determined it was not practicable to consult with the third party. However, having regard to the third party's relationship to the patient, the context of this matter and the nature of the information, I am of the view the third party would be reasonably likely not to object to the release of their personal affairs information to the Applicant. This factor weighs in favour of disclosure.

(e) Whether the disclosure of information would, or would be reasonably likely to endanger the life or physical safety of any person⁷

There is no information before me to suggest this is a relevant factor in this case.

(f) 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

⁶ *Victoria Police v Marke* [2008] VSCA 218 at [68].

⁷ Section 33(2A).

applicant seeks access to a document is a relevant consideration in determining whether disclosure would be unreasonable.⁸

The Applicant has not provided reasons as to why they seek access to their late [spouse's] medical records. Therefore, this factor neither weighs in favour nor against disclosure.

34. Accordingly, I am not satisfied the name and other identifying information of a third party in Document 2 is exempt under section 33(1).
35. The Schedule of Documents in **Annexure 1** summarises my decision in relation to section 33(1) with respect to each document.

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

Conclusion

39. I have decided to release additional information in the documents to the Applicant where I have determined it is not exempt under the FOI Act.
40. On the information available, I am satisfied the exemption in section 35(1)(b) applies to certain information within the documents. I have decided information on 'Page 455' in Document 2 is not exempt under section 33(1).
41. As I am satisfied it is practicable to provide the Applicant with an edited copy of documents with exempt information deleted in accordance with section 25, I have determined to grant access to certain documents in part.

Other matters

42. Section 49P(5) states, if I decide to disclose a document claimed to be exempt under section 33(1), if practicable, I must notify any person who has a right to apply to VCAT for a review of my decision of their right to do so.
43. In considering the meaning of 'practicable' in relation to other sections of the FOI Act, VCAT has stated the following:

⁸ *Victoria Police v Marke* [2008] VSCA 218 at [104].

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].

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.¹¹

44. VCAT also considers the possibility of an unnecessary intrusion into the lives of third parties is relevant when assessing the practicability of notifying them.¹²
45. I have decided notifying relevant third parties would be an unnecessary intrusion for the following reasons:
 - (a) the nature of the information;
 - (b) the context in which the information was provided; and
 - (c) the third party's contact details are unknown to the Agency.
46. On balance, given the unnecessary intrusion into the lives of the individuals whose personal information appears in Document 2, I am not satisfied it is practicable to notify the third party of their right of review.

Review rights

47. 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.¹³
48. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹⁴
49. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹⁵
50. 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.
51. 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.¹⁶

When this decision takes effect

52. 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.

¹¹ *Re Schubert and Department of Premier and Cabinet* (2001) 19 VAR 35 at [45].

¹² *Coulston v Office of Public Prosecutions Victoria* [2010] VCAT 1234 at [42].

¹³ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

¹⁴ Section 52(5).

¹⁵ Section 52(9).

¹⁶ 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]	Total Care Progress Note	3	Released in part Sections 33(1), 35(1)(b)	Release in part Sections 35(1)(b), 25 The document is to be released except for the following information which is exempt under section 35(1)(b) and is to be deleted in accordance with section 25: <ul style="list-style-type: none"> the last 14 lines on 'Page 413'; and the first 17 lines on 'Page 414'. 	<p>Section 35(1)(b): For the reasons discussed above, I am satisfied certain information exempted by the Agency on 'Page 413' and 'Page 414' is exempt under section 35(1)(b).</p> <p>However, I am not satisfied lines 18 to 20 on 'Page 414' contain information communicated to the Agency in confidence, as they relate to an explanation of a certain medical condition being treated. Accordingly, this information is not exempt under section 35(1)(b).</p> <p>Section 33(1): I am not satisfied lines 18 to 20 on 'Page 414' contain personal affairs information. Accordingly, section 33(1) does not apply.</p> <p>As I am satisfied the remainder of the information exempted by the Agency is exempt under section 35(1)(b), it is not necessary to consider the application of section 33(1) this information.</p> <p>Section 25: I am satisfied it is practicable to delete exempt information from the document in accordance with section 25.</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]	Total Care Progress Note	2	Released in part Sections 33(1), 35(1)(b)	Release in full	<p>Section 35(1)(b): I am not satisfied information deleted by the Agency contains information communicated to the Agency by the Agency in confidence regarding the patient's treatment. Accordingly, this document is not exempt under section 35(1)(b).</p> <p>Section 33(1): I am not satisfied the name of a third party and other identifying information is exempt under section 33(1) for the reasons outlined in the Notice of Decision above.</p>
3.	[Date]	Total Care Progress Note	2	Released in part Sections 33(1), 35(1)(b)	<p>Release in part</p> <p>Sections 35(1)(b), 25</p> <p>The document is to be released except for the following information which is exempt under section 35(1)(b) and is to be deleted in accordance with section 25:</p> <ul style="list-style-type: none"> the file note dated [date] at [time] on 'Page 476' and 'Page 477'. 	<p>Section 35(1)(b): For the reasons discussed above, I am satisfied the information deleted by the Agency is exempt under section 35(1)(b).</p> <p>Section 33(1): As I am satisfied the information deleted by the Agency is exempt under section 35(1)(b), it is not necessary to consider the application of section 33(1) this information.</p> <p>Section 25: See comments for Document 1 above.</p>