

Notice of Decision and Reasons for Decision

Applicant:	'AX4'
Agency:	Barwon Health
Decision Date:	19 December 2019
Exemptions considered:	Sections 30(1), 33(1)
Citation:	'AX4' and Barwon Health (<i>Freedom of Information</i>) [2019] VICmr 212 (19 December 2019)

FREEDOM OF INFORMATION – report into critical incident – 'RiskMan' report – health service – risk management – internal working document – public interest consideration – personal affairs information – unreasonable to disclose

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.

I am satisfied certain information in the document is exempt under sections 33(1) and 30(1).

As it is practicable to edit the document to delete exempt information, I have determined to grant access to the document in part.

The Schedule of Documents in **Annexure 1** sets out my decision in relation to the document.

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner
19 December 2019

Reasons for Decision

Background to review

1. The Applicant's representative made a request to the Agency for access to the following document:

I request a copy [of] the RiskMan completed on [date] for an incident in relation to [the Applicant] and a copy of any subsequent investigations, reports and findings in relation to the same incident.
2. In its decision, the Agency identified one document falling within the terms of the Applicant's request. It decided to grant access to the document 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 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) the information provided with the Applicant's review application;
 - (c) the Agency's submission provided on 29 August 2019; and
 - (d) the Agency's supplementary submission provided on 28 October 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 in sections 30(1), 33(1) and 35(1)(b) to refuse access to parts of the document. The Agency's decision letter sets out the reasons for its decision.

Section 30(1)

9. Section 30(1) has three requirements:
 - (a) the document must disclose matter in the nature of opinion, advice or recommendation prepared by an officer or Minister, or consultation or deliberation that has taken place between officers, Ministers or an officer and a Minister; and
 - (b) such matter must be made in the course of, or for the purpose of, the deliberative processes involved in the functions of an agency or Minister or of the government; and
 - (c) disclosure of the matter would be contrary to the public interest.

10. The exemption does not apply to purely factual material in a document.¹

Does the document contain information in the nature of opinion, advice, recommendation, consultation or deliberation prepared by an officer?

11. In *Halliday v Office of Fair Trading*,² the former Administrative Appeals Tribunal of Victoria held the words ‘opinion, advice or recommendation’ convey a meaning of matters in the nature of ‘a personal view’, ‘an opinion recommended or offered’ or ‘a presentation worthy of acceptance’.
12. The term ‘officer of an Agency’ is defined in section 5(1). It includes a member of the agency, a member of the agency’s staff, and any person employed by or for the agency, whether that person is one to whom the provisions of the *Public Administration Act 2004* (Vic) apply or not.
13. The document is a RiskMan Incident Report prepared by an Agency officer which records a clinical incident that occurred in the Agency’s emergency department. The Agency exempted information under the headings ‘Incident Assessment’, ‘Incident Follow-up’ and ‘Journals and Actions’.
14. Having reviewed the document, I am satisfied it contains some comments recorded which consist of opinion and consultation. As such, I am satisfied the document does not contain purely factual information for the purposes of section 30(3).

Were the opinions, advice or recommendations provided in the course of the Agency’s deliberative processes?

15. The term ‘deliberative process’ has been interpreted widely. In *Re Waterford and Department of Treasury (No. 2)*,³ the Commonwealth Administrative Appeals Tribunal held:

... “deliberative processes” [is] wide enough to include any of the processes of deliberation or consideration involved in the functions of an agency... In short, ... its thinking processes – the processes of reflection, for example, upon the wisdom and expediency of a proposal, a particular decision or a course of action.

16. I am satisfied the opinion and consultation were provided in the course of and for the purpose of the Agency’s deliberative processes with respect to managing clinical incidents and events concerning the Applicant.

Would it be contrary to the public interest for this information to be released?

17. I must also be satisfied disclosure of this information would not be contrary to the public interest. This requires a ‘process of the weighing against each other conflicting merits and demerits’.⁴
18. In deciding if release is contrary to the public interest, I must consider all relevant facts and circumstances remaining mindful that the object of the FOI Act is to facilitate and promote the disclosure of information.
19. In deciding whether disclosure of the document would be contrary to the public interest, I have taken the following factors into consideration:⁵
 - (a) the right of every person to gain access to documents under the FOI Act;

¹ Section 30(3).

² (unreported, AAT of Vic, Coghlan PM, 20 July 1995).

³ [1981] 1 AAR 1.

⁴ *Sinclair v Maryborough Mining Warden* [1975] HCA 17; (1975) 132 CLR 473 at 485, adopted in *Department of Premier and Cabinet v Hulls* [1999] VSCA 117 at [30].

⁵ *Hulls v Victorian Casino and Gambling Authority* (1998) 12 VAR 483.

- (b) the degree of sensitivity of the issues discussed in the document and the broader context giving rise to the creation of the document;
- (c) the stage of a decision or status of policy development or a process being undertaken at the time the communications were made;
- (d) whether disclosure of the document would be likely to inhibit communications between Agency officers, essential for the Agency to make an informed and well-considered decision or participate fully and properly in a process in accordance with the Agency's functions and other statutory obligations;
- (e) whether disclosure of the document would give merely a part explanation, rather than a complete explanation for the making of a particular decision or the outcome of a process, which the Agency would not otherwise be able to explain upon disclosure of the document;
- (f) the impact of disclosing documents in draft form, including disclosure not clearly or accurately representing a final position or decision reached by the Agency at the conclusion of a decision or process; and
- (g) the public interest in the community being better informed about the way in which the agency carries out its functions, including its deliberative, consultative and decision making processes and whether the underlying issues require greater public scrutiny.

20. I have considered the following factors in determining whether release of the document would be contrary to the public interest:

(a) The nature of the document

The document was created by officers of the Agency's health service. I accept the Agency's submission the document was prepared to assist in the eventual decision making process regarding management of risk and what safety measures and changes to practice may be necessary. The document does not constitute the Agency's final decision with respect to how to properly manage the risk.

I consider the document is sensitive in nature in that it relates to an incident that occurred while receiving medical care, and is a record of the incident's investigation and those involved in the investigation.

Investigations, both internal and external, are aimed at identifying any concerns about treatment and care provided in a particular matter, as well as determining if there are relevant learnings that can be taken from the event. Investigations and findings that come from them, promote continuous improvement in practices, policies and procedures within the public health system. This factor weighs against disclosure.

(b) The nature of the information

If the information is innocuous, dated or already known to the Applicant, it is more likely its disclosure would not be contrary to the public interest. If the information is sensitive, tentatively expressed or unclear, it is more likely its disclosure would be contrary to the public interest.⁶

⁶ *Thomas v Department of Natural Resources and Environment* [2002] VCAT 533 at [27].

In *Howard v Treasurer*,⁷ the Commonwealth Administrative Appeals Tribunal held the more sensitive the issues involved in a communication, the more likely it will be the communication should not be disclosed.

The document consists of disclosures in the Agency officer's notes, observations, assessments and analysis with respect to an incident involving the Applicant. I consider the information is not a complete record of all matters considered by the Agency in reaching a decision as to managing risk associated with the incident. It gives a partial explanation of the decision made by the Agency only.

Further, I am not satisfied it is in the public interest to disclose the exempted information in the document as I do not consider the community would be better informed about the way in which the Agency carries out its functions, including its deliberative, consultative and decision making processes. This factor weighs against disclosure.

(c) The effect of disclosure

Disclosure of information in the document may have an adverse effect on the integrity or effectiveness of future assessments conducted by the Agency in that officers seeking to report contributing factors to incidents may alter their responses to influence an Agency decision.

While Agency officers are professionally obliged to provide their opinions and comments with respect to managing patients, I accept there is a public interest in them being able to record details of discussions between Agency officers without concern such information will be disclosed to patients. Therefore, I am satisfied the impact of routinely disclosing documents of this nature would undermine the robustness of the Agency's process in developing patient plans. This factor weighs against disclosure.

(d) Nature of disclosure under FOI

Disclosure of a document under the FOI Act is unconditional and unrestricted, which means an applicant is free to disseminate widely or use a document as they choose.⁸

I accept there is a risk if preliminary investigative documents were routinely disclosed through Freedom of Information, where no restrictions or conditions can be placed upon their further use or dissemination, medical and hospital personnel may be inhibited to provide their opinions where an element of discretion exists.

There is no information before me to suggest the Applicant intends to disseminate the document if disclosed in full. However, having considered the nature of the document and the information it contains, I consider this factor weighs against disclosure.

21. While noting the right of every person to seek access to documents under the FOI Act, I consider it would be contrary to the public interest to disclose some of the information in the Incident Report due to the likelihood it would undermine the Agency's development of plans for managing clinical incidents and the ability of Agency officers to freely record their opinions and details of consultation in such a document.
22. Accordingly, I am satisfied it would be contrary to the public interest to release certain parts of the Incident Report and the relevant information in the document is exempt under section 30(1).

⁷ (Cth) (1985) 7 ALD 626; 3 AAR 169.

⁸ [2008] VSCA 218 at [68].

23. **Annexure 1** contains details of my decision with respect to the document.
24. In light of my decision in relation to section 30(1), it is not necessary for me to consider the application of the exemption in section 35(1)(b) to the same information relied on by the Agency.

Section 33(1)

25. 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;⁹ and
 - (b) such disclosure would be 'unreasonable'.
26. 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.¹⁰

Does the document contain personal affairs information?

27. The document contains the full names, contact details and position titles of Agency officers.
28. I am satisfied Agency officers' names are reasonably capable of identifying third parties, particularly in light of information in the document that was released to the Applicant by the Agency.
29. Accordingly, I am satisfied the document contains personal affairs information.

Would the disclosure be unreasonable?

30. 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.
31. I adopt the view expressed in *Victoria Police v Marke*¹¹ by the Supreme Court of Victoria Court of Appeal in which it was held there is 'no absolute bar to providing access to documents which relate to the personal affairs of others', and the exemption under section 33(1) 'arises only in cases of unreasonable disclosure' and '[w]hat amounts to an unreasonable disclosure of someone's personal affairs will necessarily vary from case to case'.
32. As also stated in *Victoria Police v Marke*, '[t]he protection of privacy, which lies at the heart of section 33(1), is an important right that the FOI Act properly protects. However, an individual's privacy can be invaded to a lesser or greater degree'.¹²
33. In determining whether disclosure of the personal information in the document 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

The nature of the personal affairs information is the names of Agency officers. The information was obtained in the context of providing health services to the Applicant.

⁹ Sections 33(1) and (2).

¹⁰ Section 33(9).

¹¹ [2008] VSCA 218 at [76].

¹² [2008] VSCA 218 at [79].

In the circumstances, I consider this factor neither weighs in favour or against disclosure.

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

While I acknowledge the Applicant's personal interest in seeking access to the information, there is no information before me to suggest the public interest would be promoted by the release of the personal affairs information of any third parties captured. This factor weighs against disclosure.

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

In relation to the release of the personal affairs information, the Agency advised it consulted with third parties in accordance with section 33(2B). The Agency advised the third parties objected to the release of their personal affairs information in the document. This weighs against disclosure.

(d) Whether release of the information could lead the persons to whom it relates suffering stress and anxiety

Having considered the incomplete nature of the information and the circumstances in which it was obtained, I consider it is reasonably likely release of the document could lead to the persons to whom it relates suffering stress and anxiety. I also note the Agency's submission in relation to this factor, and the distress it would likely cause those whose personal affairs to whom it relates. I consider this factor, when considered in combination with the factor immediately above, weighs against disclosure.

(e) 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 a document is a relevant consideration in determining whether disclosure would be unreasonable.¹³

The Applicant's initial request indicates they seek access to the document 'in relation to a potential claim for damages.'

The Agency submits the personal affairs information of the Agency officers involved in the relevant incident:

...is not relevant to the purposes of investigating and advising on a potential claim for damages, particularly in circumstances where the clinical record regarding the incident has already been released to the applicant.

This factor weighs against disclosure.

34. 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 the disclosure of the information would, or would be reasonably likely to, endanger the life or physical safety of any person. However, I do not consider this to be a relevant factor in this matter.

¹³ *Victoria Police v Marke* [2008] VSCA 218 at [104].

35. Having weighed up the above factors, I am satisfied disclosure of the personal affairs information in the Document is unreasonable in the circumstances. Accordingly, I am satisfied certain information in the Document is exempt in part under section 33(1).
36. **Annexure 1** contains details of my decision with respect to the document.

Deletion of exempt or irrelevant information

37. 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.
38. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'¹⁴ 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 25.¹⁵
39. I have considered whether it is practicable to provide the Applicant with an edited copy of the document with exempt information deleted from the document. In my view, it is practicable to do so as deleting exempt information would not require substantial time and effort, and the edited document would retain meaning.

Conclusion

40. On the information before me, I am satisfied certain information in the document is exempt under sections 33(1) and 30(1).
41. As it is practicable to edit the document to delete exempt information, I have determined to grant access to the document in part.

Review rights

42. 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.¹⁶
43. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹⁷
44. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹⁸
45. 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.
46. 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.¹⁹

¹⁴ *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].

¹⁵ *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].

¹⁶ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

¹⁷ Section 52(5).

¹⁸ Section 52(9).

¹⁹ Sections 50(3F) and (3FA).

When this decision takes effect

47. 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]	Riskman Incident Report [number]	4	Released in part Sections 33(1), 30(1) and 35(1)(b)	<p>Release in part</p> <p>Sections 33(1), 30(1), 25</p> <p>All information under the headings 'Incident Assessment', 'Incident Follow-up' and 'Journals and Actions' on pages 2 and 4 is exempt under section 30(1) and is to be deleted in accordance with section 25.</p> <p>The names, program usernames, email addresses and phone numbers are exempt under section 33(1) and are to remain deleted in accordance with section 25.</p>	<p>Section 30(1): The document contains information in the nature of opinion and recommendation produced in the course of, and for the purpose of, the Agency's deliberative process, in managing and investigating a clinical incident concerning the Applicant. I am satisfied it would be contrary to the public interest to release certain information in the Incident Report. Accordingly, the relevant information in the document is exempt under section 30(1).</p> <p>Section 33(1): I am satisfied it would be unreasonable to disclose the personal affairs information in this document for the reasons outlined in the Notice of Decision above. Accordingly, this information is exempt under section 33(1).</p> <p>Section 25: I am satisfied it is practicable to provide the Applicant with an edited copy of the document with exempt information deleted in accordance with section 25.</p>