

## Notice of Decision and Reasons for Decision

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Applicant:	'AX5'
Agency:	Monash Health
Decision Date:	19 December 2019
Exemptions considered:	Sections 33(1), 35(1)(b)
Citation:	'AX5' and Monash Health ( <i>Freedom of Information</i> ) [2019] VICmr 213 (19 December 2019)

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FREEDOM OF INFORMATION – medical record – mental health services – emergency progress note – telephone contact – patient care record – referral notes – triage notes

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 in the documents.

As I am satisfied it is practicable to delete exempt information in some of the Documents, I have decided to grant access to 17 documents in part, and refuse access to two documents 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  
19 December 2019

## Reasons for Decision

### Background to review

1. The Applicant made a request to the Agency for access to their complete medical record.
2. The Agency identified 629 documents relevant to the terms of the Applicant's request. The Agency decided to release 610 documents in full, release 12 documents in part, and refuse access to seven 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. I have examined copies of the documents subject to review.
5. During the course of the review, in response to my staff providing an initial view to the Agency on the applicability of the exemptions, the Agency agreed that certain additional information contained in the documents could be released to the Applicant.
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 and submissions received from the parties, including:
  - (a) the Agency's decision on the FOI request;
  - (b) information provided with the Applicant's review application;
  - (c) the Applicant's submission dated 26 October 2019; and
  - (d) the Agency's submission dated 29 October 2019.
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 under section 33(1) and 35(1)(b) to refuse access to 12 documents in part and seven documents in full (**Documents**). The Agency's decision letter sets out the reasons for its decision.

### ***Section 35(1)(b) – Documents containing material obtained in confidence***

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.

*Was the information or matter communicated in confidence?*

11. The Agency exempted information received by the Agency from one or more third parties in relation to the Applicant under section 35(1)(b).
12. When determining whether the information was communicated in confidence, it is necessary to consider the position from the perspective of the communicator, noting that confidentiality can be expressed or implied from the circumstances of the matter.<sup>1</sup>
13. There is nothing on the face of the statements to indicate the information was communicated in confidence. However, a document need not be marked 'confidential' for the content to be considered information communicated in confidence.<sup>2</sup>
14. Having reviewed the Documents and the nature of the information provided, I am satisfied the third parties who communicated the information to the Agency did so in circumstances in which confidentiality can reasonably be implied, based on the nature and context of the information.
15. Disclosure of the information in the Documents would therefore divulge information communicated in confidence.

*Would disclosure be contrary to the public interest?*

16. Section 35(1)(b) also requires consideration of whether the agency would be impaired from obtaining similar information in the future if the information were to be disclosed under the FOI Act. This means I must be satisfied, if the information were to be disclosed, others in the position of the communicator would be reasonably likely not to provide similar information to the Agency in the future.
17. There is an essential public interest in individuals being able to provide what is often sensitive and confidential information to medical professionals employed or engaged by a public health service. Medical staff rely on such information to assist in the provision of medical treatment to patients under their care.
18. I accept if persons, who provide confidential and sensitive information to medical professionals in relation to patients in the care of the Agency, were aware the information would be routinely disclosed in response to an FOI request, they would be less likely to communicate similar information to the Agency in the future.
19. Consequently, I am satisfied this could compromise the appropriateness and quality of care provided to patients by the Agency. I consider this would be a significant and detrimental outcome for the Agency and similar health care providers who, at times, rely on information provided by a number of sources to effectively diagnose and safely treat patients in the future. Further, it would be contrary to the interests of a patient receiving medical treatment and other health services from the Agency.
20. Accordingly, I am satisfied certain information in the documents is exempt under section 35(1)(b).

***Section 33(1) – Documents containing personal affairs information***

21. 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>3</sup> and

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<sup>1</sup> *XYZ v Victoria Police* [2010] VCAT 255 at [265].

<sup>2</sup> *Williams v Victoria Police* [2007] VCAT 1194 at [75].

- (a) such disclosure would be 'unreasonable'.

*Does the document contain personal affairs information?*

22. Information relates to the 'personal affairs' of a person if it is reasonably capable of identifying them, or of disclosing their address or location.<sup>4</sup>
23. It has also been held information relates to an individual's personal affairs if it 'concerns or affects that person as an individual'.<sup>5</sup>
24. As the nature of disclosure under the FOI Act is unrestricted and unconditional, this is to be interpreted by the capacity of any member of the public to identify a third party.<sup>6</sup>
25. The Documents contain names and telephone numbers of individuals other than the Applicant, relationship descriptors and detailed contextual information which is reasonably capable of identifying third parties, particularly in light of information in the Documents that has been released to the Applicant.
26. Accordingly, I am satisfied the Documents contain the personal affairs information of individuals other than the Applicant.

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

27. The concept of 'unreasonable disclosure' involves determining whether the public interest in disclosure of official information is outweighed by the personal interest in privacy.
28. I adopt the view expressed in *Victoria Police v Marke*<sup>7</sup> by the Victorian 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'. Further, 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'.
29. 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'.<sup>8</sup>
30. 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 described above, at paragraph 25.

It was obtained in the context of providing mental health services to the Applicant.

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

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<sup>3</sup> Sections 33(1) and (2).

<sup>4</sup> Section 33(9).

<sup>5</sup> *Hanson v Department of Education & Training* [2007] VCAT 123 at [9].

<sup>6</sup> *O'Sullivan v Department of Health and Community Services (No 2)* [1995] 9 VAR 1 at [14]; *Beauchamp v Department of Education* [2006] VCAT 1653 at [42].

<sup>7</sup> [2008] VSCA 218 at [76].

<sup>8</sup> [2008] VSCA 218 at [79].

- (b) 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.<sup>9</sup>

The Applicant submits the following with respect to their purpose for seeking the information:

... seeing that this personal information is relating directly to my health and my personal circumstances where I am going through a [redacted].

I wish to know what it is what has been provided about me and if it is true or false and then to have that information tested.

I consider the Applicant's purpose for seeking the information may be achieved by granting access to the personal affairs information of third parties. This factor weighs in favour of disclosure.

- (c) 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.

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

Having considered the nature of the information and the circumstances in which it was obtained, I am of the view the individuals whose personal affairs information is in the documents would be reasonably likely to object to the release of that information. This factor weighs against disclosure.

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

Having considered the nature of the information and the circumstances in which it was obtained, I consider it reasonably likely release of the information could lead to the persons to whom it relates suffering stress and anxiety. I consider this factor to weigh against disclosure.

- (f) Whether the disclosure of the information would, or would be reasonably likely to endanger the life or physical safety of any person<sup>10</sup>

Having reviewed the Documents, I am of the view there are reasonable grounds to consider concerns exist in relation to the effect of disclosure of this information to the Applicant on the safety of third parties.

31. Having weighed up the above factors, I am satisfied disclosure of certain personal affairs information contained in the Documents is unreasonable in the circumstances. Accordingly, I am satisfied the Documents are exempt in part under section 33(1).

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<sup>9</sup> *Victoria Police v Marke* [2008] VSCA 218 at [104].

<sup>10</sup> Section 33(2A).

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

32. 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.
33. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'<sup>11</sup> 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.<sup>12</sup>
34. I have considered the effect of deleting exempt information in the Documents. I am satisfied 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***

35. On the information before me, I am satisfied certain information in the Documents is exempt under sections 33(1) and 35(1)(b). In Documents 1, 8, 15, 16 and 17 I am not satisfied these exemptions apply to certain information and have determined this additional information can be released to the Applicant.
36. As I am satisfied it is practicable to delete exempt information in some of the Documents, I have decided to grant access to 17 documents in part, and refuse access to two documents in full.
37. The Schedule of Documents in **Annexure 1** sets out my decision in relation to each document.

### ***Review rights***

38. 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>13</sup>
39. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.<sup>14</sup>
40. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.<sup>15</sup>
41. 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.
42. 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>16</sup>

### ***When this decision takes effect***

43. 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.

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<sup>11</sup> *Mickelborough v Victoria Police (General)* [2009] VCAT 2786 [31]; *The Herald and Weekly Times Pty Limited v The Office of the Premier (General)* [2012] VCAT 967 at [82].

<sup>12</sup> *Honeywood v Department of Human Services* [2006] VCAT 2048 [26]; *RFJ v Victoria Police FOI Division (Review and Regulation)* [2013] VCAT 1267 at [140], [155].

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

<sup>14</sup> Section 52(5).

<sup>15</sup> Section 52(9).

<sup>16</sup> 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]	Mental Health Emergency Progress Note	3	Release in part  Sections 33(1), 35(1)(b), 25	Release in part  Sections 33(1), 35(1)(b), 25  The following information is not exempt and is to be released:  <ul style="list-style-type: none"> <li>Page 1: The second last paragraph, except for the first four words.</li> </ul>	<p><b>Section 33(1):</b> I am satisfied disclosure of certain personal affairs information in the document would be unreasonable in the circumstances. Accordingly, I am satisfied this information is exempt under section 33(1).</p> <p><b>Section 35(1)(b):</b> I am satisfied disclosure of certain information in this document would divulge information or matter communicated in confidence by a person to the Agency. I am satisfied disclosure would be contrary to the public interest because it would be reasonably likely to impair the ability of the Agency to obtain similar information in future. Accordingly, this information is exempt under section 35(1)(b).</p> <p>I am not, however, satisfied that certain information on page 1 of this document is exempt under sections 33(1) or 35(1)(b). Accordingly, this information is to be released. I note my staff provided the Agency with an initial view that this information was not exempt, and the Agency provided its agreement for this information to be released.</p> <p><b>Section 25:</b> I am satisfied it is practicable to provide the Applicant with an edited</p>

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
						copy of the document with exempt information deleted in accordance with section 25.
2.	[Date]	VACIS Patient Care Record	1	Release in part Sections 33(1), 35(1)(b), 25	Release in part Sections 33(1), 25  The information exempted by the Agency is to remain deleted.	Section 33(1): See comments for Document 1.  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.
3.	[Date]	[Redacted]	2	Refuse in full Sections 33(1), 35(1)(b)	Refuse in full Sections 33(1), 35(1)(b)	Sections 33(1) and 35(1)(b): See comments for Document 1.
4.	[Date]	Mental Health Emergency Psych Progress Note	1	Release in part Sections 33(1), 35(1)(b)	Release in part Sections 33(1), 35(1)(b), 25  The information exempted by the Agency is to remain deleted.	Sections 33(1), 35(1)(b) and 25: See comments for Document 1.
5.	[Date]	Mental Health Emergency Psych Progress Note	1	Release in part Sections 33(1), 35(1)(b)	Release in part Sections 33(1), 35(1)(b), 25  The information exempted by	Sections 33(1), 35(1)(b) and 25: See comments for Document 1.



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Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
					the Agency is to remain deleted.	
6.	[Date]	[Redacted]	1	Refuse in full Sections 33(1), 35(1)(b)	Refuse in full Sections 33(1), 35(1)(b)	Sections 33(1) and 35(1)(b): See comments for Document 1.
7.	[Date]	Mental Health Emergency Psych Progress Note	1	Release in part Sections 33(1), 35(1)(b)	Release in part Sections 33(1), 35(1)(b), 25  The information exempted by the Agency is to remain deleted.	Sections 33(1), 35(1)(b) and 25: See comments for Document 1.
8.	[Date]	Mental Health Intra Service Referral E-Note	1	Release in part Sections 33(1), 35(1)(b)	Release in part Sections 33(1), 35(1)(b), 25  The following information is not exempt and is to be released:  • Page 2: the first eight words of the third bullet point.	Sections 33(1), 35(1)(b) and 25: See comments for Document 1.  Further, I am not satisfied certain information on page 2 of this document is exempt under sections 33(1) or 35(1)(b). Accordingly, this information is to be released. I note my staff provided the Agency with an initial view that this information was not exempt, and the Agency provided its agreement to release this information.
9.	[Date]	Clinical Review	1	Release in part Sections 33(1),	Release in part Sections 33(1), 35(1)(b), 25	Sections 33(1), 35(1)(b) and 25: See comments for Document 1.

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
				35(1)(b)	The information exempted by the Agency is to remain deleted.	
10.	[Date]	Progress Note	1	Release in part Sections 33(1), 35(1)(b)	Release in part Sections 33(1), 35(1)(b), 25 The information exempted by the Agency is to remain deleted.	Sections 33(1), 35(1)(b) and 25: See comments for Document 1.
11.	[Date]	Progress Note	1	Refuse in full Sections 33(1), 35(1)(b)	Release in part Sections 33(1), 35(1)(b), 25 The information exempted by the Agency is to remain deleted.	Sections 33(1), 35(1)(b) and 25: See comments for Document 1.
12.	[Date]	Progress Note	1	Release in part Sections 33(1), 35(1)(b)	Release in part Sections 33(1), 35(1)(b), 25 The information exempted by the Agency is to remain deleted.	Sections 33(1), 35(1)(b) and 25: See comments for Document 1.
13.	[Date]	Progress Note	3	Release in part Sections 33(1), 35(1)(b)	Release in part Sections 33(1), 35(1)(b), 25 The information exempted by the Agency is to remain deleted.	Sections 33(1), 35(1)(b) and 25: See comments for Document 1.

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Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
14.	[Date]	Progress Note	1	Release in part  Sections 33(1), 35(1)(b)	Release in part  Sections 33(1), 35(1)(b), 25  The information exempted by the Agency is to remain deleted.	Sections 33(1), 35(1)(b) and 25: See comments for Document 1.
15.	[Date]	Referral/Triage to CATT Team	4	Refuse in full  Sections 33(1), 35(1)(b)	Release in part  Sections 33(1), 35(1)(b), 25  The following information is not exempt and is to be released: <ul style="list-style-type: none"> <li>• Page 1: All information.</li> <li>• Page 2, Section 1: All information.</li> <li>• Page 2, Section 2: Heading and content of rows 1-10 inclusive in first column only.</li> <li>• Page 2, Section 3: All information.</li> <li>• Page 2, Section 4: <ul style="list-style-type: none"> <li>- First heading and following word.</li> </ul> </li> </ul>	Sections 33(1), 35(1)(b) and 25: See comments for Document 1.  Further, I am not satisfied certain information in this document is exempt under sections 33(1) or 35(1)(b). Accordingly, this information is to be released. I note my staff provided the Agency with an initial view that this information was not exempt, and the Agency provided its agreement to release this information.

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
					<ul style="list-style-type: none"> <li>- Third heading and following 7 lines.</li> <li>• Page 3 and 4: In total.</li> </ul>	
16.	[Date]	Referral/Triage to CATT Team	3	Refuse in full  Sections 33(1), 35(1)(b)	<p>Release in part  Sections 33(1), 35(1)(b), 25</p> <p>The following information is not exempt and is to be released:</p> <ul style="list-style-type: none"> <li>• Page 1: In total.</li> <li>• Page 2, Section 1: All information.</li> <li>• Page 2, Section 2: Heading and content of rows 1-10 inclusive in first column only.</li> <li>• Page 2, Section 3: All information.</li> <li>• Page 2, Section 4:</li> </ul> <ul style="list-style-type: none"> <li>- First heading and following word.</li> <li>- Third heading and following</li> </ul>	<p>Sections 33(1), 35(1)(b) and 25: See comments for Document 1.</p> <p>Further, I am not satisfied certain information in this document is exempt under sections 33(1) or 35(1)(b). Accordingly, this information is to be released. I note my staff provided the Agency with an initial view that this information was not exempt, and the Agency provided its agreement to release this information.</p>

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
					<p>4 lines.</p> <ul style="list-style-type: none"> <li>Page 3: In total.</li> </ul>	
17.	[Date]	Referral/Triage to CATT Team	4	<p><b>Refuse in full</b></p> <p>Sections 33(1), 35(1)(b)</p>	<p><b>Release in part</b></p> <p>Sections 33(1), 35(1)(b), 25</p> <p>The following information is not exempt and is to be released:</p> <ul style="list-style-type: none"> <li>Page 1: In total.</li> <li>Page 2, Section 1: All information.</li> <li>Page 2, Section 2: Heading and content of rows 1-10 inclusive in first column only.</li> <li>Page 2, Sections 3 and 4: All information.</li> <li>Page 3, Section 1: All information.</li> <li>Page 3, Section 2: <ul style="list-style-type: none"> <li>First heading and following 4 lines.</li> </ul> </li> </ul>	<p><b>Sections 33(1), 35(1)(b) and 25:</b> See comments for Document 1.</p> <p>Further, I am not satisfied certain information in this document is exempt under sections 33(1) or 35(1)(b). Accordingly, this information is to be released. I note my staff provided the Agency with an initial view that this information was not exempt, and the Agency provided its agreement to release this information.</p>

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Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
					<ul style="list-style-type: none"> <li>- Second heading and lines 1, 2, 3, 4, 5, 7 and 8.</li> <li>- Third heading and following 2 lines.</li> <li>- Final heading and following line.</li> <li>• Page 4: All information.</li> </ul>	
18.	[Date]	Triage to CATT Team	1	Release in part  Sections 33(1), 35(1)(b)	Release in part  Sections 33(1), 35(1)(b), 25	Sections 33(1), 35(1)(b) and 25: See comments for Document 1.
19.	[Date]	Referral/Triage to CATT Team	4	Refuse in full  Sections 33(1), 35(1)(b)	<p>Release in part</p> <p>Sections 33(1), 35(1)(b), 25</p> <p>The following information is not exempt and is to be released:</p> <ul style="list-style-type: none"> <li>• Page 1: In total.</li> <li>• Page 2, Section 1: All information.</li> <li>• Page 2, Section 2: Heading and content of rows 1-10 inclusive in first column</li> </ul>	<p>Sections 33(1), 35(1)(b) and 25: See comments for Document 1.</p> <p>I am not satisfied certain information in this document is exempt under sections 33(1) or 35(1)(b). Accordingly, this information is to be released. I note my staff provided the Agency with an initial view that this information was not exempt, and the Agency provided its agreement to release this information.</p>

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Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
					<p>only.</p> <ul style="list-style-type: none"> <li>• Page 2, Section 3: All information.</li> <li>• Page 2, Section 4:               <ul style="list-style-type: none"> <li>- First heading and following word.</li> <li>- Third heading and following 4 lines.</li> <li>- Fourth heading and lines 1 to 8, 10 and 11.</li> </ul> </li> <li>• Page 3 and 4: In total.</li> </ul>	