

Notice of Decision and Reasons for Decision

Applicant:	'AY5'
Agency:	Moonee Valley City Council
Decision Date:	23 December 2019
Exemptions considered:	Sections 33(1) and 35(1)(b)
Citation:	'AY5' and Moonee Valley City Council (<i>Freedom of Information</i>) [2019] VICmr 222 (23 December 2019)

FREEDOM OF INFORMATION – maternal child and health records – health information – personal affairs – information provided in confidence – 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 the document 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 document. I am satisfied certain information in the document is exempt under sections 33(1) and 35(1)(b).

As I am satisfied it is practicable to release an edited copy of the document in accordance with section 25, I have determined to grant access to the document in part.

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner

23 December 2019

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency for access to the following documents:
 - ...information on Maternal Health Check Records and nurse notes for [named individual] Key Age and Stage Visits –
 - at two weeks of age
 - four weeks
 - eight weeks
 - four months
 - eight months
 - one year
 - 18 months
 - two years
 - three and a half years
2. The Applicant excluded the 'name of the nurse or nurses' from their request.
3. In its decision, the Agency identified one document, comprising 18 pages, and granted access in part to the document.

Review

4. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.

Documents subject to review

5. Section 25 permits an agency to grant access to an edited copy of a document, removing exempt material or information that would reasonably be regarded as irrelevant to the request, if it is practicable for the agency or Minister to delete that information, and if the applicant is agreeable to receiving such a copy.
6. The Agency deleted two attachments referred to on pages 1 and 2 of the document. The Agency did so as it determined the attachments did not fall within the scope of the Applicant's request. The information was deleted in accordance with section 25.
7. I have considered the information deleted by the Agency from the document as irrelevant. I consider the attachments, which are a referral form and notes regarding a speech pathology screening, is information that forms part of the Maternal Health Check record. Therefore, I am satisfied the attachments are relevant to the terms of the Applicant request.
8. Accordingly, my review will also include the Agency's application of section 33(1) and 35(1)(b) to this information.
9. I have examined copy of the document subject to review.
10. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
11. I have considered all communications received from the parties, including:

- (a) the Agency's decision on the FOI request;
 - (b) information provided with the Applicant's review application; and
 - (c) all communications between this office and the Agency and the Applicant.
12. 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

13. The Agency relies on the exemptions in section 33(1) and 35(1)(b) to refuse access to the document.
14. The Agency's decision letter sets out the reasons for its decision and in summary, advises the following factors were taken into account in reaching its decision:
- (a) an individual's right to privacy compared to the general right of access to information held by the Agency;
 - (b) the benefits of disclosure to the Applicant;
 - (c) the fact that there are no conditions or restrictions on dissemination of information released under the FOI Act;
 - (d) the nature of the information;
 - (e) the purpose for which the document was created or provided to the Agency; and
 - (f) any express statements of intended confidentiality as well as any inferences to the effect that the information was communicated in confidence that arise from the surrounding circumstances.

Section 33(1) – personal affairs information

15. 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'.

Does the document contain information relating to the 'personal affairs' of persons other than the Applicant?

16. 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
17. A third party's opinion or observations about another person's conduct can constitute information related to the third party's personal affairs.³

¹ Sections 33(1) and (2).

² Section 33(9).

18. The Agency applied section 33(1) to exempt names, personal descriptors and other identifying information of individuals other than the Applicant (**third parties**). The exempt information includes statements and observations of Agency officers and information provided by third parties to the Agency.
19. I am satisfied information in the document, which if released, would involve the disclosure of information relating to the personal affairs of third parties. Accordingly, it is necessary to consider if disclosure of this information would be unreasonable in the circumstances.

Would the release of the personal affairs information be unreasonable?

20. Whether disclosure of personal affairs information would be 'unreasonable' involves balancing the public interest in the disclosure of official documents containing personal affairs information with the personal interest in maintaining personal privacy. The consideration of these competing factors needs to be examined in the context of each matter.
21. In this case, I have given weight to the following factors:

(a) The nature of the personal affairs information

The document contains the opinions and observations of Agency officers and information provided by third parties to the Agency, which I consider were provided and recorded in what would reasonably be expected to be a confidential setting.

I am constrained in describing the nature of the information exempted by the Agency, as to do so may reveal information to which the exemption applies. However, having regard to the content of the information and confidential setting in which it was provided, I consider the personal affairs information to be personal and sensitive in nature. This factor weighs against disclosure.

(b) The circumstances in which the information was obtained

The Agency recorded the information as part of its functions in assessing the development and wellbeing of a child by providing support, information and advice through consultations with the family and other community networks.

As stated above, I consider information exempted by the Agency in the document would have been provided and recorded with the reasonable expectation it would be treated in confidence and would not be disclosed to a third party, including under the FOI Act. This factor weighs against disclosure.

(c) The Applicant's interest in the information being disclosed

The Applicant has indicated access to the information is sought to assist in providing relevant supports for the wellbeing of their child, where developmental concerns have been identified and access to information is important 'when discussing a relevant Health Plan' with other health professionals.

I acknowledge the Applicant has a strong personal interest in obtaining access to a complete copy of the document. However, given the personal and sensitive nature of the information and the circumstances in which it was obtained, as discussed above, I consider the Applicant's interest in the information being disclosed does not outweigh these other relevant factors.

³ *Richardson v Business Licensing Authority* [2003] VCAT 1053, cited in *Davis v Victoria Police (General)* [2008] VCAT 1343 at [43], *Pritchard v Victoria Police (General)* [2008] VCAT 913 at [24], *Mrs R v Ballarat Health Services (General)* [2007] VCAT 2397 at [13].

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

I accept there is a public interest in individuals accessing official information which concerns the physical health and wellbeing of their child. However, I am equally aware there is a fundamental interest in individuals being able to provide what is often considered private and sensitive information to medical and healthcare providers.

Where this occurs, people need to feel assured the information they provide and is recorded by Agency officers, including the identity of the person providing the information, will be held in confidence by the Agency. If people are not able to speak openly with Agency officers, the provision of appropriate care is likely to be detrimentally impacted.

Similarly, medical and healthcare providers should feel confident their professional and clinical notes they record for a clinical purpose will not be routinely disclosed under the FOI Act. In such circumstances, I consider it is reasonably likely medical and healthcare providers would be less open in the information they record, which would be likely to result in impaired outcomes for children and others who rely on the Agency's maternal child and health services.

Accordingly, I consider there is a stronger public interest in non-disclosure of information of this nature. This factor weighs against disclosure.

(e) Whether the individual whose personal affairs information would, or would be reasonably likely to object to the release of that information

Section 33(2B) requires, that in deciding whether the disclosure of a document under the FOI Act would involve the unreasonable disclosure of information relating to the personal affairs of any person, an agency must notify the person and seek their view on disclosure. However, the consultation requirements under section 33(2B) is not required in certain circumstances. This includes if the notification would be reasonably likely to cause that person undue distress or is otherwise unreasonable or it is not practicable to do so in the circumstances.⁴

In this case, the Agency considered it was not practicable to consult with third parties whose personal affairs information are exempted in the documents to obtain their views on disclosure. However, having viewed the information and having regard to the circumstances in which the Agency obtained it, I am satisfied certain third parties would be reasonably likely to object to release of their personal affairs information in the document. This factor weighs against disclosure.

(f) Whether disclosure would be reasonably likely to, endanger the life or physical safety of any person

Finally, section 33(2A) requires, in deciding whether the disclosure of a document would involve the unreasonable disclosure of a third party's personal affairs information, 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. Based on my considerations outlined above, I do not consider this factor weighs either for or against disclosure in this case.

22. In relation to personal affairs information of the Applicant's child, I am satisfied the Applicant is the child's parent and they consent to the release of this information. In the circumstances, I am satisfied disclosure of this personal affairs information, which include general observations of behaviour and physical health, would not be unreasonable. Accordingly, this information is not exempt under section 33(1).

⁴ Section 33(2C).

23. Therefore, on the information before me, with the exception of personal affairs information relating to the Applicant's child, I am satisfied it would be unreasonable to release the personal affairs information of other third parties. Accordingly, this information is exempt under section 33(1).

Section 35(1)(b) – information provided in confidence

24. The Agency refused access to the document in part, based on its application of section 35(1)(b).

25. 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?

26. 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
27. The information exempted by the Agency under section 35(1)(b) includes information that was voluntarily provided to the Agency by healthcare professionals and other third parties.
28. Accordingly, I am satisfied the information was communicated to the Agency in confidence given the nature of the information and the circumstances in and purpose for which it was provided to the Agency, as discussed above.

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?

29. The second condition in section 35(1)(b) requires that I be satisfied the disclosure of information provided in confidence would not impair the ability of the Agency to obtain similar information in the future. For example, whether others in the position of the communicator or communicators would be reasonably likely to not provide similar information to the Agency in the future should the information be disclosed.
30. In this case, I accept, in its capacity as a healthcare service provider, the Agency relies on confidential information provided by third parties to medical and healthcare providers for the purpose of planning and providing effective healthcare and social assessments and related services to clients. Such information, by its very nature, is personal and sensitive and provided in a confidential setting.
31. As discussed above, I consider there is an essential public interest in individuals being able to provide what is often sensitive and confidential information to the Agency. Where this occurs, members of the public need to feel confident the information they provide, including their identity, will be held in confidence by the Agency.⁷ If people are not able to speak openly with Agency officers, the provision of appropriate care to clients is likely to be detrimentally impacted with clients being less open in the information they provide. I consider this would be likely to result in impaired outcomes for children and others who rely on the Agency's maternal child and health services.

⁵ Ibid, XYZ at [265].

⁶ Ibid.

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

32. However, I acknowledge certain persons, who provided confidential information to the Agency have an obligation to do so, and that this fact, in many circumstances, would mean the information is not exempt under this section.
33. Having carefully reviewed the document and the nature of information released to the Applicant, I have determined while certain information was provided to the Agency in confidence, its disclosure to the Applicant in some circumstances would not impair the Agency's ability to obtain similar information in the future. Therefore, I have determined certain information the Agency exempted under section 35(1)(b) is not exempt.

Deletion of exempt or irrelevant information

34. As outlined above, section 25 requires an agency to grant access to an edited copy of a document when it is practicable for the agency to do so. 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
35. I have considered the information the Agency deleted from the document as irrelevant. I agree it falls outside the scope of the Applicant's request as it relates to the names of nurses, which are not sought by the Applicant.
36. I have considered the effect of deleting irrelevant and exempt information from the document. In my view, I am satisfied it would be practicable to delete this information in accordance with section 25, as to do so would not require substantial time and effort and the edited document would retain meaning.

Conclusion

37. I am satisfied certain information in the document is exempt under sections 33(1) and 35(1)(b).
38. As I am satisfied it is practicable to release an edited copy of the document in accordance with section 25, I have determined to grant access to the document in part.

Review rights

39. 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
40. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹¹
41. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹²
42. 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.

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).

43. 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

Other matters

44. Section 49P(5) states, if I decide to disclose a document claimed to be exempt under section 33(1) and 35(1)(b) I must, if practicable, notify any person who has a right to apply to VCAT for a review of my decision of their right to do so.

45. VCAT has held in relation to the meaning of 'practicable' in the FOI Act:

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.¹⁴

46. VCAT also considers the possibility of an unnecessary intrusion into the lives of the third parties is relevant when assessing the practicability of notifying them.¹⁵

47. On balance, I am satisfied it is not practicable to notify relevant third parties of their review rights.

When this decision takes effect

48. 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.

¹³ Sections 50(3F) and (3FA).

¹⁴ *Re Schubert and Department of Premier and Cabinet* (2001) 19 VAR 35 at [45].

¹⁵ *Coulston v Office of Public Prosecutions Victoria* [2010] VCAT 1234 at [42].