

Notice of Decision and Reasons for Decision

Applicant:	'BB1'
Agency:	Eastern Health
Decision Date:	30 January 2020
Exemptions considered:	Sections 33(1), 35(1)(b)
Citation:	'BB1' and Eastern Health (<i>Freedom of Information</i>) [2020] VICmr 14 (30 January 2020)

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 is the same as the Agency's decision.

I am satisfied the information deleted by the Agency is exempt under sections 33(1) and 35(1)(b).

As I am satisfied it is practicable to delete exempt information in the documents, in accordance with section 25, I have determined to grant access to the documents in part.

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner
30 January 2020

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency for access to their complete medical record.
2. In its decision, the Agency identified 67 pages falling within the terms of the Applicant's request and decided to release 63 pages in full and four pages 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. In their submission, the Applicant advised they do not seek access to the names, addresses or telephone numbers of any party who provided information recorded in the documents.
5. I have examined copies of the documents subject to review.
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) the Applicant's submission received on 13 January 2020; and
 - (c) information provided by the Agency during the review.
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 in sections 33(1) and 35(1)(b) to refuse access to certain information in part. The Agency's decision letter sets out the reasons for its decision.

Section 35(1)(b)

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 to the Agency?

11. 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
12. Information exempted by the Agency under section 35(1)(b) includes information voluntarily provided by third parties in the course of the Agency providing medical treatment to the patient.
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 its content to have been communicated in confidence.³
14. The Agency determined it was not practicable to consult with third parties to seek their views on the basis it could not identify the third parties with certainty, given the passage of time since the documents were created.
15. However, 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 to the Agency by third parties.

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 Agency's ability 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. I accept such information, where it relates to a patient receiving medical treatment and healthcare by the Agency, particularly in relation to mental health services, by its very nature, will generally be personal and sensitive.
19. In my view, if individuals who provide information to the Agency regarding an a patient's health were aware their identity and the information they provide would be routinely disclosed in response to an FOI request, they would be less likely to communicate similar information to the Agency in future. I consider this would be detrimental for the Agency, which relies on receiving such information to provide timely and necessary medical treatment and health services to patients.
20. 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 patients.
21. I acknowledge the Applicant has a genuine interest in obtaining full access to their medical records, as outlined in their submission. However, in weighing these competing considerations, I consider the

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

² *Ibid.*

³ *Williams v Victoria Police* [2007] VCAT 1194 at [75].

need to protect personal and sensitive information provided in confidence to the Agency by a third party, in the interests of a patient's healthcare and wellbeing, outweighs an applicant's personal interest in obtaining access to this information.

22. Accordingly, I am satisfied the information deleted by the Agency under section 35(1)(b) is exempt.

Section 33(1)

23. 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
- (a) such disclosure would be 'unreasonable'.

Do the documents contain personal affairs information of individuals other than the Applicant?

24. 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

25. 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.⁶

26. The medical records contain the names, relationship descriptors and other information capable of identifying multiple third parties.

27. Notwithstanding the Applicant advised they do not seek access to the names, addresses or telephone numbers of any party that provided information to the Agency, even if this information were to be removed as irrelevant under section 25, I am satisfied other information in the documents would still constitute the personal affairs information of third parties.

28. Accordingly, I am satisfied the documents subject to review contain the personal affairs information of individuals other than the Applicant.

Is disclosure of the personal affairs information unreasonable?

29. 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.

30. I adopt the view expressed in *Victoria Police v Marke*⁷ 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'.

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

⁴ Sections 33(1) and (2).

⁵ Section 33(9).

⁶ *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].

⁷ [2008] VSCA 218 at [76].

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

The personal affairs information exempted by the Agency under section 33(1) was obtained by the Agency on a voluntarily basis from third parties in the course of the Agency providing medical treatment and health services to the Applicant.

Accordingly, the release of this information would disclose the identity of third parties who discussed and provided information to the Agency in confidence concerning the Applicant's health and care.

I accept in these circumstances, such information is sensitive and personal, despite the passage of time since the documents were created.

This factor weighs against disclosure.

(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 to a document is a relevant consideration in determining whether disclosure would be unreasonable.⁸

In their submission, the Applicant states they seek access to the information because they are compiling their family archives for an autobiographical manuscript and wish to gain 'a full [and] accurate reflection of [their life] at the time'. I consider the release of the personal affairs information of third parties will not assist the Applicant in this instance.

This factor weighs against disclosure.

(c) 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.⁹ 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 information before me to support the view the Applicant may disseminate the information in an autobiographical manuscript.

This factor weighs against disclosure.

(d) 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.

This factor weighs against disclosure.

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

⁹ *Victoria Police v Marke* [2008] VSCA 218 at [68].

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

I note in support of their application for review, the Applicant submitted signed letters from their parents consenting to the release of information they may have provided to the Agency during the Applicant's admission.

As discussed above, the Agency advised it was not practicable to consult with third parties to obtain their views regarding the release of personal affairs information.

Having regard to the context of this matter, the nature of the information and the relationship of the third parties to the Applicant, I am of the view certain third parties would be reasonably likely not to object to the release of their personal affairs information to the Applicant.

On balance, this factor neither weighs in favour or against disclosure.

- (f) Whether the disclosure of information would, or would be reasonably likely to endanger the life or physical safety of any person¹⁰

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

32. Having considered the above factors, I am of the view the privacy of the third parties outweighs the Applicant's interest in disclosure of the personal affairs information in this instance.
33. Accordingly, I am satisfied the information deleted by the Agency under section 33(1) is exempt.

Deletion of exempt information

34. 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.
35. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'¹¹ 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 25.¹²
36. I have considered the effect of deleting exempt information from the documents. In my view, it is practicable for the Agency to delete this information in accordance with section 25, as to do so would not require substantial time and effort and the edited documents would retain meaning.

Conclusion

37. On the information available, I am satisfied the information deleted by the Agency under sections 33(1) and 35(1)(b) is exempt.
38. As I have determined it is practicable to provide the Applicant with an edited copy of the documents with exempt information deleted in accordance with section 25, the documents are exempt in part.

¹⁰ Section 33(2A).

¹¹ *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].

¹² *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].

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

When this decision takes effect

44. 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 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).