

Notice of Decision and Reasons for Decision

Applicant:	'AP3'
Agency:	Melbourne Health
Decision date:	10 October 2019
Exemptions considered:	Sections 33(1), 35(1)(b)
Citation:	'AP3' and Melbourne Health (<i>Freedom of Information</i>) [2019] VICmr 138 (10 October 2019)

FREEDOM OF INFORMATION – medical records – personal affairs information – unreasonable disclosure – information obtained in confidence

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 in that I have decided to release 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
10 October 2019

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency for access to their full medical records.
2. In its decision dated 25 July 2019, the Agency identified 127 pages falling within the terms of the Applicant's request. It decided to release the 127 pages with two redactions made in one document, comprising the Inpatient Discharge Summary.

Review

3. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access to the information redacted in the Inpatient Discharge Summary.
4. I have examined a copy of the Inpatient Discharge Summary, which is the Document subject to review (the **Document**).
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 Applicant's submission dated 30 September 2019 and information provided with the Applicant's review application;
 - (c) information provided by the Agency during my review; and
 - (d) all communications between OVIC and the Agency and the Applicant.
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 33(1) and 35(1)(b) to refuse access to the Document. The Agency's decision letter sets out the reasons for its decision.

Section 33(1)

9. 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
 - (a) such disclosure would be 'unreasonable'.

¹ Sections 33(1) and (2).

Does the information constitute 'personal affairs information'?

10. 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
11. I also note the Victorian Civil and Administrative Tribunal (**VCAT**) has accepted a third party's opinion or observations about another person's conduct can constitute information related to the third party's personal affairs.³
12. VCAT has interpreted the scope of 'personal affairs information' to be wide, and includes matters related to the health, private behaviour, home life or personal or family relationships of individuals.⁴
13. The Document subject to review comprises an Inpatient Discharge Summary completed by a consultant psychiatrist and a psychiatric registrar.
14. The information considered exempt by the Agency under section 33(1) is the identifying information of third parties.
15. I am satisfied the information identified by the Agency listed above amounts to 'personal affairs information' for the purposes of section 33(1).

Would release of the personal affairs information be unreasonable?

16. Determining whether disclosure would be unreasonable involves balancing the public interest in the disclosure of official information with the personal interest in privacy in the particular circumstances of a matter.
17. In deciding whether disclosure of a document would involve the unreasonable disclosure of a third party's personal affairs information, an agency must notify that person (or, if deceased, the person's next of kin) that an FOI request has been received for documents containing personal information and seek their view as to whether disclosure of the document should occur.⁵ However, this obligation does not arise if:
 - (a) the notification would be reasonably likely to endanger the life or physical safety of a person, or cause them undue stress, or is otherwise unreasonable in the circumstances;
 - (b) the notification would be reasonably likely to increase the risk to the safety of a person experiencing family violence; or
 - (c) it is not practicable to do so.⁶
18. In this instance, the Agency advised it was not practicable to consult with the third parties. I have considered the Agency's reasons and accept third party consultation is not practicable in the circumstances.

² Section 33(9).

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].

⁴ *Re F and Health Department* (1988) 2 VAR 458 as quoted in *RJF v Victoria Police FOI Division* [2013] VCAT 1267 at [103].

⁵ Section 33(2B).

⁶ Section 33(2C).

19. In determining whether the release of the personal affairs information is unreasonable, I consider the following matters are particularly relevant:
- (a) the nature of the personal affairs information (for example, whether it is sensitive or its current relevance);
 - (b) the extent to which the information is available to the public;
 - (c) the circumstances in which the information was obtained (for example, whether it was obtained involuntarily or in confidence);
 - (d) the Applicant's interest in the information, including their purpose or motive for seeking access to the Document;
 - (e) whether any public interest would be promoted by disclosure;
 - (f) the likelihood of further disclosure of the information if it is released;
 - (g) whether the individuals to whom the information relates consent or object to the disclosure;
 - (h) whether disclosure would cause the individuals stress, anxiety or embarrassment; and
 - (i) whether the disclosure of information relating to the personal affairs of any person would, or would be likely to, endanger the life or physical safety of any person.
20. I have also taken into consideration the nature of 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 disclosed to them as they choose.⁷
21. Having reviewed the Document subject to review, I am satisfied release of the information exempted by the Agency would involve the unreasonable disclosure of personal affairs information of individuals other than the Applicant, taking into account the following factors:
- (a) the information provided to the Agency is sensitive in nature;⁸
 - (b) the information was provided to the Agency with an expectation of privacy. I have formed this view given the sensitivity of the information provided and consider the third parties would be likely to object to release of such information; and
 - (c) the Applicant's interest in obtaining the information is a matter of private interest. I do not consider any public interest would be promoted by disclosure of the personal affairs information of third parties to the Applicant. I am of the view the greater public interest lies in the Agency preserving the privacy of third parties in these circumstances.
22. While I acknowledge the Applicant has a genuine interest in obtaining their full medical records, I have determined the need to protect certain information provided to health services in confidence outweighs the Applicant's personal interest in obtaining this information. Therefore, I am satisfied it would be unreasonable to disclose the personal affairs information of third parties in this instance.
23. I am also required to consider section 33(2A) in determining if release of the personal affairs information of third parties would be unreasonable. This provision requires that I consider whether disclosure of information would, or would be reasonably likely, to endanger the life or physical safety of any person. In my view, there are reasonable grounds to consider that concerns exist in relation to the impact of disclosure on the safety of third parties.
24. Accordingly, I have determined disclosure of the personal affairs information in the Document would be unreasonable and this information is exempt under section 33(1).

⁷ *Victoria Police v Marke* [2008] VCSCA 218 at [68].

⁸ *Page v Metropolitan Transit Authority* [1988] 2 VAR 243 at [246].

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.
26. When determining whether information was communicated in confidence, it is necessary to consider the position from the perspective of the communicator.⁹ Further, confidentiality can be expressed or implied from the circumstances of the matter.¹⁰

Was the information or matter communicated in confidence?

27. The information exempted by the Agency is information that was provided to the Agency by a person or persons concerned with the Applicant's safety and wellbeing.
28. The information was recorded and received by Agency officers during the course of the Agency providing treatment to the Applicant.
29. It is clear from the face of the Document there was an understanding the information provided would remain confidential.
30. Accordingly, I am satisfied the information was communicated to the Agency in confidence. This view takes into account the sensitivity of the information and the circumstances in which it was provided.
31. However, the fact the information was communicated in confidence is not the only consideration in relation to the exemption in 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?

32. Section 35(1)(b) also requires I consider whether the Agency would be impaired from obtaining similar information in the future if information is disclosed under the FOI Act.
33. This means I must be satisfied that, 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.
34. In its decision letter, the Agency advised it would be contrary to the public interest to release the information as disclosure would be reasonably likely to impair the ability of the Agency to obtain similar information in the future.
35. In this case, I accept that, in its capacity as a healthcare provider, the Agency relies on confidential information being provided by third parties to plan and provide effective treatment and care to its patients. Such information, by its very nature, is generally highly personal, sensitive and confidential.

⁹ *XYZ v Victoria Police (General)* [2010] VCAT 255 at [265].

¹⁰ *Ibid.*

36. 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 that the information they provide to the Agency, including their identities, will be held in confidence by the Agency.¹¹
37. Further, I am of the view that if individuals who provide confidential information to the Agency were aware their identity and the information they provide would 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 to be a significant and detrimental outcome for the Agency which, at times, relies on confidential information being received in order to provide timely and necessary treatment or intervention.
38. Furthermore, section 35(1)(b) is concerned with protecting the public interest in the free flow of information between agencies and individuals upon whom it relies. In the context of the Agency, being a hospital, the voluntary provision of sensitive information is often vital to the Agency's ability to effectively discharge its functions.
39. In *Debono v Department of Justice FOI Officer*,¹² VCAT upheld the exemption under section 35(1)(b) in relation to information that was provided in confidence by third parties on the physical and psychological condition of the Applicant. VCAT found that third parties would not make reports about the health of others if they were aware that their information may be revealed, in particular, to the patient.
40. On the other hand, I acknowledge the Applicant has a genuine interest in obtaining the information provided as it directly relates to the Applicant.
41. However, in weighing these two competing priorities, I have determined the need to protect sensitive information provided in confidence to the Agency outweighs the Applicant's personal interest in obtaining this information.
42. For these reasons, I am satisfied the information exempted by the Agency in the Document is exempt under section 35(1)(b).

Deletion of exempt or irrelevant information

43. 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.
44. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'¹³ 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 25.¹⁴
45. I have considered the effect of deleting exempt information from the Document. In my view, it is practicable to delete such information as to do so would not require substantial time and effort, and the edited document would retain meaning.

¹¹ See *Maki v Alfred Hospital*, unreported, VCAT, Davis M, 19 April 2002.

¹² [2008] VCAT 1791.

¹³ *Mickelburgh 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].

¹⁴ *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].

Conclusion

46. On the information available, I am satisfied the exemptions in sections 33(1) and 35(1)(b) apply to the Document. My decision is the same as the Agency's decision in that I have decided to grant access to the Document in part.

Review rights

47. If either party to this review is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.¹⁵
48. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹⁶
49. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹⁷
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.¹⁸

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.

¹⁵ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

¹⁶ Section 52(5).

¹⁷ Section 52(9).

¹⁸ 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]	Inpatient Discharge Summary	4	Released in part Sections 33(1), 35(1)(b)	Released in part Sections 33(1), 35(1)(b), 25	<p>Section 33(1): I am satisfied the release of the personal affairs information of individuals other than the Applicant would be unreasonable in the circumstances. Accordingly, this information is exempt under section 33(1).</p> <p>Section 35(1)(b): I am satisfied the information provided to medical professionals at the Agency was communicated in confidence and disclosure of the information would be contrary to the public interest as it would impair the ability of the Agency to obtain similar information in the future. Accordingly, this information is exempt under section 35(1)(b).</p> <p>Section 25: It is practicable to delete exempt information from the Document as to do so would not require substantial time and effort, and the edited document would retain meaning.</p>