

Notice of Decision and Reasons for Decision

Applicant:	'BB6'
Agency:	Department of Health and Human Services
Decision Date:	6 February 2020
Exemptions considered:	Sections 33(1), 35(1)(b)
Citation:	'BB6' and Department of Health and Human Services (<i>Freedom of Information</i>) [2020] VICmr 20 (6 February 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.

I am satisfied information in the documents is exempt under sections 33(1) and 35(1)(b).

As I am satisfied it is practicable to delete exempt information from 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

6 February 2020

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency for access to their psychiatric records.
2. In its decision, the Agency identified five documents relevant to the terms of the Applicant's request. It decided to release two documents in full and three documents 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 documents 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) information provided with the Applicant's review application; and
 - (c) the Agency's submission dated 10 January 2020.
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 under sections 33(1) and 35(1)(b) to certain information in part. 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
 - (b) such disclosure would be 'unreasonable'.

¹ Sections 33(1) and (2).

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

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. 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.³
12. Having viewed the documents, I am satisfied the documents contain the following 'personal affairs information' of third parties for the purpose of section 33(1):
 - (a) the names of multiple third parties;
 - (b) sensitive information about the personal history of a third party;
 - (c) interview notes; and
 - (d) admission records of multiple third parties.

Is disclosure of the personal affairs information unreasonable?

13. 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.
14. In *Victoria Police v Marke*,⁴ the Victorian Court of Appeal held there is 'no absolute bar to providing access to documents which relate to the personal affairs of others'. Further, the Court held 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'.
15. In determining whether disclosure of personal affairs information in the documents 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 personal affairs information exempted by the Agency under section 33(1) was voluntarily obtained by the Agency from third parties in the course of providing mental health care to the Applicant. Accordingly, 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 care.

I am of the view the personal affairs information of third parties was provided to the Agency in confidence with a view the parties' identity would not be disclosed. I have formed this view given the sensitivity of the information provided to the Agency. Further, I am satisfied the sensitivity of the personal affairs information has not diminished despite the passage of time since the documents were created.

Accordingly, this factor weighs against disclosure.

² Section 33(9).

³ *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].

⁴ [2008] VSCA 218 at [76].

(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.⁵

The Applicant submits they seek access to unredacted records over concern certain third parties may have provided inaccurate information to the Agency. Accordingly, the Applicant seeks access to their records in full to determine whether to request amendments to their records.

I consider the release of the documents in full may assist the Applicant. Accordingly, this factor weighs in favour of 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.⁶ Accordingly, I must consider the likelihood and potential effects of further dissemination of a third party's personal affairs information, if released.

In the circumstances and given the nature of the information sought by the Applicant, I am of the view the Applicant would be unlikely to further disseminate the information if disclosed. Accordingly, this weighs in favour of disclosure.

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

In the circumstances and given the nature of the information sought by the Applicant, I do not consider there is a broader public interest that would be promoted by disclosure of 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. Accordingly, this factor weighs against disclosure.

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

I do not have information before me regarding the views of the third parties to whom the personal affairs information relates. I am satisfied it was not practicable for the Agency to consult with the third parties given the sensitive circumstances of this matter and the passage of time since the documents were created.

Considering the sensitive circumstances surrounding the documents and the nature of the information which I am satisfied would have been provided by the third parties to the Agency in confidence, I am satisfied it is reasonably likely the third parties would object to the release of their personal affairs information. Accordingly, this factor weighs against disclosure.

⁵ *Victoria Police v Marke* [2008] VSCA 218 at [104].

⁶ *Victoria Police v Marke* [2008] VSCA 218 at [68].

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

I am also required to consider section 33(2A) of the Act in determining if release of a third party's personal affairs information would be unreasonable. This provision requires me to consider whether disclosure of information would, or would be reasonably likely, to endanger the life or physical safety of any person. However, there is no information before me to suggest this is a relevant factor in this case.

16. I appreciate the Applicant's strong personal interest in obtaining access to this information. I also acknowledge the Applicant would wish for a complete copy of the document without any redactions, as redactions made to documents can create a sense of disappointment and frustration to an applicant, regardless of whether only a small amount of material is withheld. However, having weighed up the above factors, I consider the privacy of the relevant third parties outweighs the Applicant's interest in obtaining disclosure of the personal affairs information.
17. Accordingly, I am satisfied certain information in the documents is exempt under section 33(1).

Section 35(1)(b)

18. 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?

19. When determining whether information was communicated in confidence, it is necessary to consider the position from the perspective of the communicator.⁷ Further, confidentiality can be express or implied from the circumstances of the matter.⁸
20. I am satisfied the information exempted by the Agency under section 35(1)(b) is information voluntarily communicated to the Agency by third parties in the course of the Applicant's admission into psychiatric care.
21. While I do not have specific information regarding the views of the third parties, as stated above, I am satisfied certain information was likely communicated to the Agency in confidence. This view is based on the sensitive circumstances surrounding the documents, the nature of the information and the circumstances in which the information was provided to the Agency.

Would disclosure of the information be contrary to the public interest?

22. I must also consider whether disclosure would be contrary to the public interest as the ability of the Agency to obtain similar information in the future would be impaired if the information is disclosed under the FOI Act. This means I must consider whether, if the information were to be disclosed, others in the position of the communicators would be reasonably likely to be inhibited in providing similar information to the Agency.

⁷ XYZ v Victoria Police [2010] VCAT 255 at [265]

⁸ XYZ v Victoria Police [2010] VCAT 255.

23. There is a fundamental interest in individuals being able to provide what is often sensitive information about a person to medical professionals and other Agency staff.
24. Where it is beneficial or necessary for information of this nature to be disclosed to the Agency, I am of the view members of the public need to feel confident information they provide to the Agency, including their identity or identifying information, will be held in confidence.⁹
25. In my view, if individuals who provide information to the Agency regarding an individual's mental health and circumstances were aware their identity and the information they provide was to 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 a significant and detrimental outcome for the Agency, which relies on receiving such information.
26. If individuals are unable to speak frankly and provide information to medical and other staff, the appropriateness and quality of care provided to patients or vulnerable members of the public may be detrimentally affected. Information provided by third parties is particularly critical in cases where mental health concerns are raised, and such information is relied upon by the Agency when comprehensively assessing the circumstances of a patient. I consider the withholding of such information would have a detrimental impact on the medical outcomes and wellbeing of patients.
27. 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 need to protect personal and sensitive information provided by third parties in confidence to the Agency, in the interests of a patient's healthcare and wellbeing, outweighs the Applicant's personal interest in obtaining access to this information.
28. Accordingly, I am satisfied certain information in the documents is exempt under section 35(1)(b).

Deletion of exempt or irrelevant information

29. 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.
30. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'¹⁰ 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 25.¹¹
31. I have considered the effect of deleting exempt information from the documents. In my view, 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

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

⁹ See *Maki v Alfred Hospital*, unreported, VCAT, Davis M, 19 April 2002.

¹⁰ *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].

¹¹ *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].

33. As I am satisfied it is practicable to provide the Applicant with an edited copy of documents, with exempt information deleted in accordance with section 25, I have determined to grant access to the documents in part.

Review rights

34. 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.¹²
35. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹³
36. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹⁴
37. 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.
38. 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.¹⁵

When this decision takes effect

39. 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.

¹² The Applicant in section 50(1)(b) and the Agency in section 50(3D).

¹³ Section 52(5).

¹⁴ Section 52(9).

¹⁵ Sections 50(3F) and (3FA).