

## Notice of Decision and Reasons for Decision

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Applicant:	'BB4'
Agency:	Eastern Health
Decision date:	3 February 2020
Exemptions considered:	Sections 32(1), 33(1), 35(1)(b)
Citation:	'BB4' and Eastern Health ( <i>Freedom of Information</i> ) [2020] VICmr 18 (3 February 2020)

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FREEDOM OF INFORMATION – medical records – FOI requests – psychiatric triage – names of clinicians/medical practitioners – names of hospital staff – information provided by third parties – admissions episode clinical and risk assessment – patient correspondence

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 to the Applicant.

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  
3 February 2020

## Reasons for Decision

### Background to review

1. On [date], the Applicant made a request to the Agency for access to all records relating to the Applicant.
2. The Agency acknowledged the request on [date] and, by letter dated [date], clarified the request as being for records from the Applicant's admission to the Agency in [year].
3. In response, the Applicant clarified their request as follows:
  - (a) all documentation about the Applicant outlining their attempts to have their grievances heard by the Agency; and
  - (b) all information post-[year], as described in the Agency's letter dated [date].
4. The Agency confirmed the request relates to records post-[year] via email on [date].
5. The Agency responded to the Applicant's request on [date]. The Agency identified 368 pages of records within scope of the Applicant's request and granted access to documents in part.
6. During the review, the Agency clarified the number of pages quoted in the Agency's decision letter should have referred to 357 pages. This error was due to the identification of duplicate documents. Of these, 237 pages are subject to review as they were released to the Applicant in part. The remaining pages were released to the Applicant in full.

### Review

7. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
8. I have examined copies of the six documents subject to review.
9. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
10. 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 review request and subsequent information provided during the review; and
  - (c) further information provided by the Agency on 24 January 2020.
11. 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

12. The Agency relies on the exemptions in sections 32(1), 33(1) and 35(1)(b) to refuse access to the documents in part. The Agency's decision letter sets out the reasons for its decision.

### **Section 32(1)**

13. The Agency exempted Document 1 (pages 105 and 106) under section 32(1). The document is a file note of a telephone conversation between an Agency officer and the Agency's legal adviser.
14. Section 32(1) provides a document is an exempt document 'if it is of such a nature that it would be privileged from production in legal proceedings on the ground of legal professional privilege or client legal privilege'.
15. A document will be subject to legal professional privilege and exempt under section 32(1) where it contains a confidential communication:<sup>1</sup>
  - (a) between the client (or the client's agent) and the client's professional legal advisers, that was made for the dominant purpose of obtaining or providing legal advice or is referable to pending or contemplated litigation;
  - (b) between the client's professional legal advisers and third parties, that was made for the dominant purpose of pending or contemplated litigation; or
  - (c) between the client (or the client's agent) and third parties that was made for the purpose of obtaining information to be submitted to the client's professional legal advisers for the dominant purpose of obtaining advice on pending or contemplated litigation.
16. While I note the document records information provided by the Agency's legal adviser, I am not satisfied it was provided for the dominant purpose of obtaining or providing legal advice. Rather, it deals predominantly with complaints made by the Applicant about various Agency services over a period of time. There is nothing on the face of the document to suggest the author of the note was seeking legal advice, or that amounts to legal advice provided to the Agency officer by the legal adviser.
17. Therefore, I am not satisfied Document 1 is exempt under section 32(1).

### **Section 33(1)**

18. 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>2</sup> and
  - (b) such disclosure would be 'unreasonable'.
19. 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.<sup>3</sup>
20. 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.
21. Section 33(2A) requires, in deciding whether disclosure of a document would involve the unreasonable disclosure of information relating to the personal affairs of any person, I must take into account whether the disclosure of the information would, or would be reasonably likely to, endanger

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<sup>1</sup> *Graze v Commissioner of State Revenue* [2013] VCAT 869 at [29]; *Elder v Worksafe Victoria* [2011] VCAT 1029 at [22]. See also *Evidence Act 2008* (Vic), section 119.

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

<sup>3</sup> Section 33(9).

the life or physical safety of any person. However, I do not consider this to be a relevant factor in the circumstances.

22. 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 an FOI request has been received for documents containing their personal information and seek their view as to whether they consent or object to disclosure of the document.<sup>4</sup> 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 distress, 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.<sup>5</sup>
23. The Agency determined consultation with third parties would not have been practicable given the number of third parties, the age of the documents and the sensitivity of information in the documents.
24. While important, whether third parties agree to the disclosure of their personal affairs is not determinative. I have also considered the following factors in determining if disclosure would be unreasonable in the circumstances:
  - (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 for seeking access to the documents);
  - (e) whether any public interest would be promoted by release of the information;
  - (f) whether the individuals to whom the information relates would be likely to object to the release of the information;
  - (g) the likelihood of further disclosure of the information, if released; and
  - (h) whether disclosure of the information would, or would be reasonably likely to, endanger the life or physical safety of any person.
25. The Agency determined to exempt the following information in the documents under section 33(1):
  - (a) the names of Agency officers, including medical practitioners;
  - (b) the names of third parties;
  - (c) information from which third parties could be identified, including telephone numbers, addresses and certain dates services were provided; and

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<sup>4</sup> Section 33(2B).

<sup>5</sup> Section 33(2C).

- (d) designations, initials and signatures of agency staff and third parties.
26. I am satisfied the above listed information amounts to personal affairs information for the purposes of section 33(1).
27. In the circumstances, I am satisfied the disclosure of this information would be unreasonable for the following reasons:
- (a) The disclosure of the names of people, who provided services to an Applicant would not generally be considered unreasonable. However, given the context of this matter, I consider this information to be sensitive.
  - (b) I consider certain personal information, particularly provided by third parties, was provided to the Agency with an expectation of privacy. I have formed this view given the sensitivity of the information provided.
  - (c) I acknowledge the Applicant's interest in this information, as it relates to their own medical records. However, I must consider the specific circumstances of this matter, weighing the Applicant's interest in the documents with the privacy of those persons, whose details appear in the documents.
  - (d) I consider there is a public interest in the non-disclosure of this information in circumstances where the protection of the information provides for the open and frank exchange of relevant information between Agency officers and third parties.
  - (e) The Agency expressed concerns the Applicant may contact people named in the documents if their names were disclosed.
  - (f) After careful consideration of the circumstances relevant to this matter, I have determined the personal privacy of Agency staff and third parties outweighs the Applicant's personal interest in obtaining access to the documents.
28. Therefore, I am satisfied certain information in the documents is exempt under section 33(1).

**Section 35(1)(b)**

29. 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.
30. The Agency determined consultation with third parties in accordance with section 35(1A) was not practicable for reasons similar to those set out in paragraph 22.
31. The type of information the Agency decided is exempt under this section is information provided by third parties.
32. Given the sensitivity of the information provided, and the circumstances in which it was provided (being in relation to the provision of medical treatment and health services to the Applicant as a patient), I am satisfied the information was provided in confidence to the Agency.
33. Therefore, I must consider whether 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.

34. On the information before me, I am satisfied information in the documents is exempt under section 35(1)(b) as it was provided to the Agency in confidence and its disclosure would be contrary to the public interest in that its disclosure would impair the ability of the Agency to obtain similar information in the future. In particular:
- (a) My review is based on the information before me. The Agency has considered the impact of the disclosure of information it exempted in the documents which is informed by its expertise in the provision of medical treatment and health care to patients, including the Applicant. Therefore, I have given considerable weight to and accept its submissions made concerning the nature of the information and the impact of disclosure.
  - (b) I have interpreted this exemption broadly in the context of this matter given my view the effect of disclosing the exempt information could be detrimental for the Agency, its officers and other third parties.
  - (c) While it is not clear whether the Applicant is a current patient of the Agency, it may be they required medical and health services from the Agency in the future. Therefore, disclosure may adversely affect the ability of the Agency to obtain similar information in the future which, in turn, could affect or compromise medical treatment and health care provided to the Applicant.
35. Therefore, I am satisfied certain information in the documents is exempt under section 35(1)(b).

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

36. 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.
37. Determining what is ‘practicable’ requires consideration of the effort and editing involved in making the deletions ‘from a resources point of view’<sup>6</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>7</sup>
38. I have considered the effect of deleting exempt information from the documents. I am satisfied it is practicable to delete the exempt information, because it would not require substantial time and effort, and the edited documents would retain meaning.

#### ***Conclusion***

39. On the information before me, I am satisfied the documents are exempt under sections 33(1) and 35(1)(b).
40. As I am satisfied it is practicable to delete the exempt information in the documents in accordance with section 25, I have decided to grant access to the documents in part.
41. My decision in relation to each document is set out in the Schedule of Documents in **Annexure 1**.

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<sup>6</sup> *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].

<sup>7</sup> *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**

42. 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>8</sup>
43. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.<sup>9</sup>
44. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.<sup>10</sup>
45. 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.
46. 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>11</sup>

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

47. 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>8</sup> The Applicant in section 50(1)(b) and the Agency in section 50(3D).

<sup>9</sup> Section 52(5).

<sup>10</sup> Section 52(9).

<sup>11</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 range]	Medical records	180	Released in part  Sections 33(1), 35(1)(b), 32(1)	Release in part  Sections 33(1), 35(1)(b), 25  The document is to be released with:  <ul style="list-style-type: none"> <li>information exempted by the Agency under sections 33(1) and 35(1)(b) is to remain deleted in accordance with section 25; and</li> <li>information exempted by the Agency under section 32(1) not deleted except for the names and signatures on pages 105 and 106, which are exempt under section 33(1).</li> </ul>	Section 32(1): I am not satisfied pages 105 and 106 are exempt under section 32(1) for the reasons set out above. However, the names and signatures on these pages are exempt under section 33(1).  Sections 33(1) and 35(1)(b): I am satisfied the passages exempted by the Agency are exempt under sections 33(1) and 35(1)(b) for the reasons set out above.
2	[date]	Email from applicant to the agency	1	Released in part  Section 33(1)	Release in part  Sections 33(1), 25  The document is to be released with information exempted by the Agency under section 33(1) to remain deleted in accordance with section 25.	Sections 33(1): The document is an email to the Agency from the Applicant. Given the age of the information exempted by the Agency, and concerns expressed by the Agency, I am satisfied it would be unreasonable to release the name of the Agency staff member in the document.



Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
3	[date]	Emails between Applicant and the Agency	3	Released in part Section 33(1)	Release in part Sections 33(1), 25  The document is to be released with information exempted by the Agency under section 33(1) to remain deleted in accordance with section 25.	Sections 33(1): See comments for Document 2.
4	[date]	Agency to Deputy Chief Psychiatrist	1	Released in part Section 33(1)	Release in part Sections 33(1), 25  The document is to be released with information exempted by the Agency under section 33(1) to remain deleted in accordance with section 25.	Sections 33(1): See comments for Document 2.
5	[date]	Email from Agency to Applicant	1	Released in part Section 33(1)	Release in part Sections 33(1), 25  The document is to be released with information exempted by the Agency under section 33(1) to remain deleted in accordance with section 25.	Sections 33(1): See comments for Document 2.

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
6	[date range]	Screening register details	51	Released in part Section 33(1), 35(1)(b)	Release in part Sections 33(1), 25  The document is to be released with information exempted by the Agency under sections 33(1) and 35(1)(b) to remain deleted in accordance with section 25.	Sections 33(1) and 35(1)(b): I am satisfied the passages exempted by the Agency are exempt under sections 33(1) and 35(1)(b) for the reasons set out above.