

## Notice of Decision and Reasons for Decision

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| Applicant:             | 'B11'   |
| Agency:                | Northern Health   |
| Decision date:         | 23 March 2020   |
| Exemptions considered: | Sections 30(1), 33(1), 35(1)(b)   |
| Citation:              | 'B11' and Northern Health ( <i>Freedom of Information</i> ) [2020] VICmr 79 (24 March 2020) |

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FREEDOM OF INFORMATION – medical records – health records – internal documents – meeting record – disclosure not contrary to the public interest – personal affairs information – personal privacy – unreasonable disclosure

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 the document is exempt under section 33(1). However, I am not satisfied parts of the document, being pages 18 and 19 are exempt under sections 30(1) and 35(1)(b).

As I am satisfied it is practicable to delete the exempt information from the documents in accordance with section 25, the documents are to be released in part.

Accordingly, my decision on the Applicant's request differs from the Agency's decision to the extent I have decided to release additional information in the document.

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  
23 March 2020

## Reasons for Decision

### Background to review

1. The Applicant made a request to the Agency for access to the medical record of their deceased [parent].
2. In its decision, the Agency identified 664 pages of documents falling within the terms of the Applicant's request. It decided to grant access to 381 pages in full, refuse access to 281 pages in part and refuse access to two pages in full.

### 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 received from the parties, including:
  - (a) the Agency's decision on the FOI request; and
  - (b) information provided with the Applicant's review application.
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 30(1), 33(1) and 35(1)(b) to refuse access to documents. The Agency's decision letter sets out the reasons for its decision.

### Section 35(1)

9. Section 35(1) provides a document is exempt if its disclosure would divulge any information or matter communicated in confidence by or on behalf of a person or a government to an agency. This provision contains two exemptions: sections 35(1)(a) and 35(1)(b).
10. The Agency did not specify in its decision which exemption it relied on under section 35(1), but stated:

... disclosure would be reasonably likely to impair the ability of an agency or minister to obtain similar information in the future.
11. Therefore, I consider the Agency's intended to rely on the exemption in section 35(1)(b) to refuse access to pages 18 and 19 of the document. My assessment of the application of section 35(1)(b) to the information is as follows.

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

12. 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.
13. The Agency relied on section 35(1)(b) to refuse access to pages 17 and 18 in full. The pages are a record of a meeting between Agency officers and officers of other government agencies involved in the health care of the Applicant's [parent].
14. When determining whether information was communicated in confidence, it is necessary to consider the position from the perspective of the communicator.<sup>1</sup> Further, confidentiality can be expressed or implied from the circumstances of the matter.<sup>2</sup>
15. I have carefully considered the content of the document. In particular, the perspective of the individuals who communicated the information to the Agency. I am not satisfied the information was communicated in circumstances where confidentiality can be implied. I consider the information was communicated for a policy purpose and contains summary information, rather than confidential disclosures made by third parties.
16. Further, from my review of the information, I am satisfied it was provided and recorded in the context where each government agency was obliged to share information and advice with the Agency. In such circumstances, I am not satisfied the information meets the requirements of the exemption in section 35(1)(b).
17. Even if I accepted the information was communicated in confidence, the relevant consideration under section 35(1)(b) is whether the Agency would be impaired from receiving similar information in the future. Given the context in which the information was provided to the Agency, I am not satisfied this requirement is met given the above circumstances.
18. Accordingly, I am not satisfied pages 18 and 19 in the document are exempt under section 35(1)(b).

### **Section 30(1)**

19. The Agency also relied on section 30(1) to refuse access to pages 18 and 19 in the document.
20. Section 30(1) has three requirements:
  - (a) the document must disclose matter in the nature of opinion, advice or recommendation prepared by an officer or Minister, or consultation or deliberation that has taken place between officers, Ministers or an officer and a Minister;
  - (b) such matter must be made in the course of, or for the purpose of, the deliberative processes involved in the functions of an agency or Minister or of the government; and
  - (c) disclosure of the matter would be contrary to the public interest.
21. The exemption does not apply to purely factual material in a document.<sup>3</sup>

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<sup>1</sup> *XYZ v Victoria Police* [2010] VCAT 255 at [265].

<sup>2</sup> *Ibid.*

22. In *Re Waterford and Department of Treasury (No. 2)*,<sup>4</sup> the Commonwealth Administrative Appeals Tribunal held:
- ... “deliberative processes” [is] wide enough to include any of the processes of deliberation or consideration involved in the functions of an agency... In short, ...its thinking processes — the processes of reflection, for example, upon the wisdom and expediency of a proposal, a particular decision or a course of action.
23. As stated above, the exempt information is a record of meeting. Having carefully reviewed the information, I am not satisfied it meets the first limb of the exemption, as it appears to be a record of the attendee’s final decision rather than information that describes an option, series of alternatives to be considered, thinking processes of the Agency or its deliberations leading to a decision.
24. Even if I were satisfied the first limb of the exemption were met, the relevant consideration under section 30(1) is whether disclosure of the document would be contrary to the public interest.
25. In deciding whether disclosure of the information in this matter would be contrary to the public interest, I have taken the following factors into consideration:<sup>5</sup>
- (a) the right of every person to gain access to documents under the FOI Act;
  - (b) the degree of sensitivity of the issues discussed in the documents and the broader context giving rise to the creation of the documents;
  - (c) the stage of the decision, status of policy development or process being undertaken at the time the communication was made;
  - (d) whether disclosure of the documents would likely inhibit communications between agency officers, essential for the agency to make an informed and well-considered decision or participate fully and properly in a process in accordance with the agency’s functions and other statutory obligations; and
  - (e) the public interest in the community being better informed about the way in which the agency carries out its functions, including its deliberative, consultative and decision-making processes and whether the underlying issues require greater public scrutiny.
26. Having carefully reviewed the information, I do not consider it discloses sensitive deliberations that would be contrary to the public interest to release. I am of the view that the degree of the sensitivity of the issues involved in the deliberations to be quite low, and the document not to be highly significant in the context of high level hospital decision making.
27. I also consider the age of the information has significantly reduced any sensitivity or current relevance. Further, given the information discusses a policy directly concerning the Applicant, I am of the view the information, or at least the gist of the information, would have been communicated to them. Accordingly, having regard to the broader context in which the document was created, I am not satisfied its release would be reasonably likely to inhibit future communications between officers of the Agency, or disrupt the ability of the Agency to continue to make informed decisions in accordance with its functions.

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<sup>3</sup> Section 30(3).

<sup>4</sup> (1981) 1 AAR 1.

<sup>5</sup> *Hulls v Victorian Casino and Gambling Authority* (1998) 12 VAR 483.

28. Accordingly, as I am not satisfied it would be contrary to the public interest to release the information on pages 18 and 19, these pages of the document are not exempt under section 30(1).

**Section 33(1)**

29. 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, including a deceased person;<sup>6</sup> and
  - (b) such disclosure would be 'unreasonable'.
30. Information relating to the 'personal affairs' of a person includes information that identifies any person or discloses their address or location. It also includes any information from which such information may be reasonably determined.<sup>7</sup>

*Would disclosure of the document involve the disclosure of information relating to the personal affairs of a person other than the Applicant?*

31. The Agency deleted the names, initials, signatures, emails and direct telephone numbers of Agency staff from the documents. I am satisfied this information constitutes personal affairs information for the purposes of section 33(1).

*Would disclosure of the personal affairs information be unreasonable in the circumstances?*

32. The concept of 'unreasonable disclosure' involves balancing the competing public interest in disclosure of official information, with the interest in protecting the personal privacy a person other than the applicant.
33. The following factors are commonly considered in determining whether disclosure is unreasonable in the circumstances of a matter:
- (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 object, or 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.

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<sup>6</sup> Sections 33(1) and (2).

<sup>7</sup> Section 33(9).

34. In weighing up the above factors, I have decided disclosure of the personal affairs information in the document would be unreasonable for the following reasons:
- (a) In some instances, it is clear the personal affairs information was provided to the Agency with an expectation of privacy. I have formed this view given the content and context of the information provided.
  - (b) I acknowledge the Applicant's interest in this information. However, I note the names of staff and other third parties have been carefully assessed by the Agency and have been released wherever possible.
  - (c) I am not satisfied there is an overriding public interest in the release of the personal affairs information that outweighs the personal privacy of the relevant third parties whose personal affairs information is contained in the documents.
  - (d) Further, I consider the Applicant is able to read and interpret the document without the inclusion of specific staff names, and the personal affairs information does not add any material value to the documents, as released to the Applicant.
  - (e) In determining if release of a third party's personal affairs information would be unreasonable, I am also required to consider section 33(2A) of the FOI Act. 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. In my view, based on certain information already released to the Applicant by the Agency, I consider there are reasonable grounds to consider that concerns exist about the effect of disclosure on the health and safety of Agency staff.
35. Therefore, I am satisfied personal affairs information, being names, signatures, direct telephone numbers and email addresses of Agency staff and third parties are exempt under section 33(1).

#### ***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 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>8</sup> and the effectiveness of the deletions. Where deletions would render a document meaningless, they are not 'practicable', and release of the document is not required under section 25.<sup>9</sup>
38. I have considered the effect of deleting exempt information from the documents in accordance with section 25. I am satisfied it is practicable for the Agency to delete the exempt information as to do so 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 document is exempt under section 33(1). However, I am not satisfied pages 18 and 19 of the document are exempt under sections 30(1) and 35(1)(b).
40. As I am satisfied it is practicable to delete the exempt information from the documents in accordance with section 25, the documents are to be released in part.

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<sup>8</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>9</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].

41. Accordingly, my decision on the Applicant's request differs from the Agency's decision to the extent I have decided to release additional information in the document.
42. The Schedule of Documents in **Annexure 1** sets out my decision in relation to each document.

### **Review rights**

43. 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>10</sup>
44. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.<sup>11</sup>
45. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.<sup>12</sup>
46. 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.
47. 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>13</sup>

### **Notification of third party review rights**

48. Section 49P(5) provides if I make a decision to disclose a document claimed by an agency to be exempt under section 35(1), if practicable, I must notify any person who has a right to make an application for review of the decision under section 50(3AB) of the existence of that right.
49. I have decided to release information the Agency determined was exempt under section 35(1)(b).
50. Where practicable to do so, the relevant persons will be notified of my decision of their right to apply to VCAT for a review within 60 days from the date they are given notice of my decision.
51. However, I am not satisfied it is practicable to notify all persons of their review rights, as in some instances, I consider there is insufficient information to ascertain their contact details.

### **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.

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<sup>10</sup> The Applicant in section 50(1)(b) and the Agency in section 50(3D).

<sup>11</sup> Section 52(5).

<sup>12</sup> Section 52(9).

<sup>13</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.           | Various          | Medical Record       | 664             | Released in part<br>Sections 30(1), 35(1)(b), 33(1) | Release in part<br>Sections 33(1), 25<br><br>Pages 18 and 19 are to be released except for the names of Agency officers and third parties, which are to be deleted in accordance with section 25. | <p><b>Sections 30(1) and 35(1)(b):</b> For the reasons set out above, I am satisfied information in the document is not exempt under sections 30(1) and 35(1)(b).</p> <p><b>Section 33(1):</b> For the reasons set out above, I am satisfied it would be unreasonable to release the personal affairs information of Agency staff in pages 18 and 19 in the document. Accordingly, I am satisfied pages 18 and 19 in the document are exempt under section 33(1).</p> <p><b>Section 25:</b> As I am satisfied it is practicable to delete the exempt information from the documents in accordance with section 25, the documents are to be released in part.</p> |