

Notice of Decision and Reasons for Decision

Applicant:	'BH2'
Agency:	Department of Health and Human Services
Decision date:	17 March 2020
Exemption considered:	Section 33(1)
Citation:	'BH2' and Department of Health and Human Services (<i>Freedom of Information</i>) [2020] VICmr 71 (17 March 2020)

FREEDOM OF INFORMATION – health records – mental health records – personal records – medical records – Redevelopment of Acute & Psychiatric Information Directions (RAPID) report – names of agency officers – personal affairs information – 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.

My decision on the Applicant's request is the same as the Agency's decision.

I am satisfied the Document is exempt under section 33(1). As it is practicable to edit exempt information in the Document, in accordance with section 25, I have determined to grant access to the Document in part.

My reasons for decision follow.

Joanne Kummrow

Public Access Deputy Commissioner

17 March 2020

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency for access to their mental health records.
2. In its decision, the Agency identified one document (the **Document**) falling within the terms of the Applicant's request. The Agency granted access to the Document 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 a copy of the Document 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 3 March 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 exemption under section 33(1) to refuse access to parts of 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 Document 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 such information 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. The Document contains the full names of mental health services staff and the name of the Agency officer who compiled the Document.
13. I am satisfied the staff names identify the third parties. Accordingly, I am satisfied the Document contains the personal affairs information of individuals other than the Applicant.

Is disclosure of the personal affairs information unreasonable?

14. The concept of 'unreasonable disclosure' involves balancing the public interest in the disclosure of official information with the interest in protecting an individual's personal privacy in the circumstances.
15. In *Victoria Police v Marke*,⁴ the Victorian Supreme Court of Appeal 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'.
16. As also stated in *Victoria Police v Marke*, '[the] protection of privacy, which lies at the heart of s 33(1), is an important right that the FOI Act properly protects. However, an individual's privacy can be invaded to a lesser or greater degree'.⁵
17. In determining whether disclosure of the personal information in the Document 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 Agency submits the Document is a copy of the Applicant's Redevelopment of Acute and Psychiatric Information Directions (**RAPID**) history. RAPID forms part of a statewide information system that stores all client service level information collected by public clinical mental health services.

The information recorded in RAPID is a select data set of data that was extracted from the more comprehensive, Client Management Interface (**CMI**) system, which is a local client information system used by each public mental health service attended by the Applicant.

The Agency submits the following:

The circumstances in which the information in the RAPID was obtained is clearly relevant. In this instance, staff at individual public mental health services are required to record information in the CMI system about clients who have received mental health treatment at the health service.

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].

⁵ [2008] VSCA 218 at [79].

Of the information recorded CMI systems, only some of the data is shared with the department through RAPID. The purpose of the data sharing is to allow the department to comply with its monitoring and reporting obligations under the *Mental Health Act 2014*. It is not intended to be comprehensive or complete record of the interaction between the patient and the health service.

Accordingly, the RAPID history is an incomplete extract of the Applicant's medical treatment. The information stored on the CMI of each public mental health service provides more contextual and detailed information in relation to the Applicant's medical treatment.

The nature of the personal affairs information is the first name and surname of multiple staff.

The information was obtained in the context of providing mental health services to the Applicant.

In the circumstances of this matter, I consider this factor neither weighs in favour or 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.⁶

I have considered information provided by the Applicant in support of their review application, including a detailed description of their personal circumstances and history, and reasons for seeking access to the Document. I acknowledge the Applicant's strong and significant personal interest in obtaining access to the Document in full.

In relation to this factor, the Agency submits:

...While it is clear the applicant has a personal interest in the information...releasing the names of staff working at the mental health services, or the name of the departmental staff member who printed the RAPID report will not further the applicant's interests.

Furthermore, as the department only holds a select set of data provided by the mental health services the applicant attended for the purpose of monitoring and reporting, it is more appropriate for the mental health service who recorded the information, and who has a complete record of the interaction, to make an assessment of what information should be released to the applicant at this point in time.

The department has already released the names of all mental health services the applicant attended and the dates [they] attended them. This is sufficient information to enable the applicant to seek more comprehensive records from the mental health services directly. To further assist the applicant in this process, we have also provided the contact details for each of the health services [they] attended.

On balance, I consider 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.⁷ Accordingly, I must

⁶ *Victoria Police v Marke* [2008] VSCA 218 at [104].

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

consider the likelihood and potential effects of further dissemination of a third party's personal affairs information, if released.

There is no information before me to suggest the Applicant intends to disseminate the personal affairs information in the Document.

I am of the view this factor neither weighs in favour or against disclosure.

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

There is no information before me to suggest the public interest would be promoted by the release of the personal affairs information of any third parties in the Document.

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 any information before me as to the views of the persons to whom the information relates. The Agency submits consultation was deemed impracticable due to:

... the time and effort involved in consulting with a large number of professionals involved in the case history of this client. Furthermore, given the context in which the information is shared by health services with the department, is it likely the staff members would not want their names to be disclosed.

Having considered the incomplete nature of the information and the circumstances in which it was obtained, I am of the view the individuals whose personal affairs information is contained in the documents would be likely to object to the release of that information.

On balance, this factor weighs against disclosure.

(f) Whether the disclosure of information would, or would be reasonably likely to endanger the life or physical safety of any person⁸

Section 33(2A) requires that, in deciding whether the 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 the life or physical safety of any person.

I do not consider this to be a relevant factor in this matter.

18. I appreciate the Applicant's strong personal interest in this information. I also acknowledge the Applicant seeks a complete copy of the Document without any redactions, as redactions made to a document can create a sense of disappointment and frustration for an applicant, regardless of whether only a small amount of material is withheld.
19. However, having considered the above factors, I am of the view the interest in protecting the personal privacy of the third parties outweighs the Applicant's interest in disclosure of the personal affairs information in the circumstances.
20. Accordingly, I am satisfied the Document is exempt under section 33(1).

⁸ Section 33(2A).

Deletion of exempt or irrelevant information

21. Section 25 requires an agency to grant access to an edited copy of a document when it is practicable to delete exempt or irrelevant information and the applicant agrees to receiving such a copy.
22. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'⁹ 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 25.¹⁰
23. I have considered the effect of deleting exempt information from the Document. I am satisfied it is practicable to delete exempt information from the Document in accordance with section 25.

Conclusion

24. On the information before me, I am satisfied the Document is exempt under section 33(1).
25. As it is practicable to edit exempt information in the Document, in accordance with section 25, I have determined to grant access to the Document in part.

Review rights

26. 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.¹¹
27. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹²
28. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹³
29. 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.
30. 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.¹⁴

When this decision takes effect

31. 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.

⁹ *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].

¹⁰ *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].

¹¹ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

¹² Section 52(5).

¹³ Section 52(9).

¹⁴ Sections 50(3F) and (3FA).