

Notice of Decision and Reasons for Decision

Applicant:	'BH8'
Agency:	Eastern Health
Decision date:	24 March 2020
Exemptions considered:	Sections 33(1), 35(1)(b)
Citation:	'BH8' and Eastern Health (<i>Freedom of Information</i>) [2020] VICmr 77 (24 March 2020)

FREEDOM OF INFORMATION – applicant's medical records – health records – information provided to agency by third parties – handwritten progress notes

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.

I am not satisfied the information subject to review in the documents is exempt under sections 33(1) and 35(1)(b).

As I am satisfied it is practicable to delete the irrelevant information in the documents, I have determined to grant access to the documents in part in accordance with section 25.

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

24 March 2020

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency for access to their complete medical record held by Agency.
2. In its decision, the Agency identified certain documents falling within the terms of the Applicant's request and 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. In their review application, the Applicant advised:

I am seeking a review of all the redactions in my health records regarding a [person]. One of the reasons I requested access to my health records was because I wanted to know what I shared, other people's impressions and what was recorded about [circumstances]. A lot of this information appears to not have been released to me due to Sections 33(1) and 35(1)(b) of the FOI Act and I would like this to be reviewed. [Description of circumstances]. I would like this information for my own personal processing of what occurred. I am interested to know what information was provided by myself and others at the time and whether or not it informed or influenced the diagnoses and treatment I received and to what extent this context of my distress was considered. For years I have lived with the harmful effects of [name]'s conduct and to have it redacted from my health records is difficult.

5. I have examined copies of the documents subject to review. From my review of the documents, I consider the Applicant is seeking my review of certain information the Agency determined to be exempt in Documents 1, 3, 5, 6, 7, 8, 10, 11 and 13.
6. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
7. I have considered all communications and submissions received from the parties, including:
 - (a) the Agency's decision on the FOI request; and
 - (b) the Applicant's review application.
8. 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

9. The Agency relied on sections 33(1) and 35(1)(b) to refuse access to parts of the documents. The Agency's decision letter sets out the reasons for its decision.

Section 33(1)

10. 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'.
11. 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
 12. The concept of 'unreasonable disclosure' involves balancing the public interest in the disclosure of official information with the interest in protecting the privacy of an individual other than the applicant (a **third party**) in the circumstances.
 13. 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.³ I do not consider this to be a relevant factor in the circumstances.
 14. 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 views on possible disclosure of the document,⁴ unless certain circumstances arise.⁵
 15. In this case, the Agency advised it did not consult with the relevant third party.

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

16. In my view the personal affairs information, to which the Applicant seeks access, is both that of the Applicant and a third party. While the information recorded in the document may have been provided by the Applicant to the Agency, it also relates to a third party in that the document contains information from which they can be identified or their identity can be reasonably determined.

Would disclosure of the personal affairs information be unreasonable?

17. In *Victoria Police v Marke*,⁶ 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 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'.
18. In determining whether disclosure of personal affairs information in the documents would be unreasonable in this matter, I have considered the following factors:

- (a) The nature of the personal affairs information and the circumstances in which the information was obtained

The information subject to the review is sensitive as it relates to the third party and their personal circumstances. However, I also note:

¹ Sections 33(1) and (2).

² Section 33(9).

³ Section 33(2A).

⁴ Section 33(2B).

⁵ Section 33(2C).

⁶ [2008] VSCA 218 at [76].

- (a) there is limited information about the third party in the documents;
- (b) some of the information is publicly available, [description of information]; and
- (c) the documents are now at least [specified number of] years old.

For some of the records (those not relating to information clearly provided by other third parties) it is not clear whether information about the third party was provided by the Applicant or other parties.

I also note the information was collected by the Agency for the purposes of recording background information to assist in the treatment of the Applicant.

On balance, I consider this factor weighs against disclosure.

- (b) The Applicant's interest in the information, and whether their purpose for seeking the information is likely to be achieved

I note the Applicant's submission above and I consider they have a genuine interest in seeking access to the document in full as it relates to a significant event in their life.

This factor weighs in favour of disclosure.

- (c) The likelihood of further disclosure of the information, if released

I consider it is unlikely the information, if released, would be further disseminated. This is based on the Applicant's submission [they are] seeking the information to understand [their] own past and health care treatment. In any case, other information is in the public domain [redacted] which is more detailed than that contained in the document.

This factor weighs in favour of disclosure.

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

I do not consider there is a public interest in disclosure, rather, disclosure of the documents services the Applicant's personal interest. 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

There is no information before me as to whether the third party would object or consent to the release of the information as the Agency did not consult with the relevant third party.

On balance, I consider it is reasonably likely the third party would object to disclosure of their personal affairs information in the document given the sensitive circumstances of this matter. However, this is not determinative.

As discussed above, there is very little information in the document concerning the third party and other information exists in the public domain [redacted] and more than [specified number of] years has passed since the document was created.

On balance, this factor weighs neither in favour nor against disclosure.

- (f) Whether the disclosure of information would, or would be reasonably likely to endanger the life or physical safety of any person⁷

There is no information before me that disclosure of the document is likely to endanger the life or physical safety of a person.

19. Having reviewed the information in the document, on balance, I consider the age of the documents, the Applicant's reasons for seeking the information, and the fact other information exists in the public domain [redacted], I do not consider disclosure of the personal affairs information in the documents is unreasonable in the circumstances.
20. Accordingly, I am not satisfied the personal affairs information in the document is exempt under section 33(1).

Section 35(1)(b)

21. 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.
22. As stated above, the Agency did not consult with the relevant third party.
23. The Agency applied section 35(1)(b) to one section of information at the top of the first page of Document 3.

Was the information communicated in confidence to the Agency?

24. I accept the relevant information was provided by another third party to the Agency in confidence.

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

25. This matter is finely balanced. Generally, in matters of this nature, I consider the disclosure of information provided by third parties to a health service is done so with the health care of the patient in mind, and that such care can be fully informed and enhanced by open communication between health service provider and others with knowledge of the patient. It is often considered contrary to the public interest to disclose such information as it is reasonably likely to impair the ability of the health services provider to obtain similar information in the future out of concern it may be disclosed to the patient at a future time.
26. However, in these particular circumstances, I am satisfied disclosure of the relevant information would not have such an effect as:
- (a) the information is brief and factual;
 - (b) does not appear to be contentious;
 - (c) rather, for the most part, it is clear it is known by the Applicant; and

⁷ Section 33(2A).

(d) the information was provided more than [specified number of] years ago.

27. Accordingly, I am not satisfied the relevant information in the document is exempt under section 35(1)(b).

Deletion of exempt or irrelevant information

28. 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.
29. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'⁸ 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 25.⁹
30. The Applicant seeks review of certain information in the documents only. Therefore, the remaining information determined to be exempt by the Agency is irrelevant.
31. I have considered the effect of deleting irrelevant information from the documents in accordance with section 25. I am satisfied it is practicable to delete the irrelevant information as to do so would not require substantial time and effort, and the edited documents would retain meaning.
32. My decision in relation to each document is set out in the Schedule of Documents in **Annexure 1**.

Conclusion

33. On the information before me, I am not satisfied the information subject to review in the documents is exempt under sections 33(1) and 35(1)(b).
34. As I am satisfied it is practicable to delete the irrelevant information in the documents, I have determined to grant access to the documents in part in accordance with section 25.

Review rights

35. 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.¹⁰
36. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹¹
37. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹²
38. 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.
39. 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.¹³

⁸ *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].

⁹ *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].

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

¹¹ Section 52(5).

¹² Section 52(9).

Third party review rights

40. If I decide to disclose a document an agency exempted under section 33(1), if practicable, I must notify any third party, who has a right to seek review by VCAT of my decision, of their review rights.
41. In considering the meaning of 'practicable' in relation to other sections of the FOI Act, VCAT has stated:

The use of the word 'practicable' in the legislation to my mind connotes a legislative intention to apply common sense principles. 'Practicable' is not a term of art or a term of precise meaning.

.... The use of the word indicates there should be imported into the process the exercise of judgment by the agency concerned. It does not allow for the conclusion that because a task is possible, it must, ergo, be undertaken.¹⁴

42. VCAT also considers the possibility of an unnecessary intrusion into the lives of third parties is relevant when assessing the practicability of notifying them.¹⁵
43. In the circumstances, I am satisfied it is not practicable to notify the relevant third parties as to do so would be an unnecessary intrusion into their lives, and also based on the nature of the information and the passage of time since the document's creation.

When this decision takes effect

44. 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.

¹³ Sections 50(3F) and (3FA).

¹⁴ *Re Schubert and Department of Premier and Cabinet* (2001) 19 VAR 35 at [45].

¹⁵ *Coulston v Office of Public Prosecutions Victoria* [2010] VCAT 1234 at [42].

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
1	[Date]	[Named] Health Service	6	Released in part Section 33(1)	Release in part Section 25 The document is to be released with irrelevant information deleted in accordance with section 25.	Section 33(1): I am satisfied information deleted by the Agency from page 2 is not exempt under section 33(1) for the reasons set out above. Section 25: Information not sought by the Applicant is irrelevant to the request and is practicable to delete from the document in accordance with section 25.
2	[Date]	First contact/duty/triage form	3	Released in part Section 33(1), 35(1)(b)	Not subject to review	
3	[Date]	First contact continuation sheet	6	Released in part Section 33(1), 35(1)(b)	Release in part Section 25 The document is to be released with irrelevant information deleted in accordance with section 25.	Section 33(1): I am satisfied information deleted by the Agency from page 1 is not exempt under section 33(1) for the reasons set out above. Section 25: Information not sought by the Applicant is irrelevant to the request and is practicable to delete from the document in accordance with section 25.
4	[Date]	[Named health care facility] Psychiatry Intake Assessment	6	Released in part Section 33(1)	Not subject to review	
5	Undated	Clinical Risk	2	Released in part	Release in full	Section 33(1): I am not satisfied information

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Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
		Assessment and Management		Section 33(1)		deleted by the Agency from page 1 is exempt under section 33(1) for the reasons set out above.
6	[Date]	[Named health care facility] Triage Mobilisation Report	6	Released in part Section 33(1)	Release in full	Section 33(1): I am not satisfied information deleted by the Agency from page 1 is exempt under section 33(1) for the reasons set out above.
7	[Date]	[Named health care facility] Inpatient Unit - Separation Summary	2	Released in part Section 33(1)	Release in part Section 25 The document is to be released with irrelevant information deleted in accordance with section 25.	Section 33(1): I am not satisfied information deleted by the Agency from the last two lines of text on page 1 is exempt under section 33(1) for the reasons set out above. Section 25: Information not sought by the Applicant is irrelevant to the request and is practicable to delete from the document in accordance with section 25.
8	[Date]	[Named health care facility] Admission Format	9	Released in part Section 33(1)	Release in part Section 25 The document is to be released with irrelevant information deleted in accordance with section 25.	Section 33(1): I am satisfied information deleted by the Agency from the second last line of text on page 5 is not exempt under section 33(1) for the reasons set out above. Section 25: The document is to be released with irrelevant information deleted in accordance with section 25.

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
9	[Date]	[Named third party]	1	Released in part Section 33(1)	Not subject to review	
10	[Date]	[Named third party]	2	Released in part Section 33(1)	Release in full	Section 33(1): I am satisfied information deleted by the Agency from page 1 is not exempt under section 33(1) for the reasons set out above.
11	[Date]	[Named] Health Service	4	Released in part Section 33(1)	Release in part Section 25 The document is to be released with irrelevant information deleted in accordance with section 25.	Section 33(1): I am satisfied information deleted by the Agency from page 2 and the information on page 3 under the heading 'gender specific issue' is not exempt under section 33(1) for the reasons set out above. Section 25: The document is to be released with irrelevant information deleted in accordance with section 25.
12	[Date]	First Contact/ Duty/ Triage Form	3	Released in part Section 33(1)	Not subject to review	
13	[Date]	[Named] Mental Health Service	6	Released in part Section 33(1)	Release in part Section 25 The document is to be released with irrelevant	Section 33(1): I am satisfied information deleted by the Agency from page 2 and page 3 under the heading 'gender specific issue' is not exempt under section 33(1) for the reasons set out above.

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
					information deleted in accordance with section 25.	Section 25: The document is to be released with irrelevant information deleted in accordance with section 25.