

## Notice of Decision and Reasons for Decision

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Applicant:	'B19'
Agency:	Peninsula Health
Decision date:	26 March 2020
Exemptions considered:	Sections 33(1), 35(1)(b)
Citation:	'B19' and Peninsula Health ( <i>Freedom of Information</i> ) [2020] VICmr 87 (26 March 2020)

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FREEDOM OF INFORMATION – medical records – health records – mental health records – information provided in confidence to agency by 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.

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

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

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

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  
26 March 2020

## Reasons for Decision

### Background to review

1. The Applicant made a request to the Agency for access to the following documents:
  - ... all files relating to my mental health made or received by [named] hospital and [named] mental health centre...
  - ...
2. In its decision, the Agency identified documents falling within the scope of the request, the majority of which were released to the Applicant. The Agency relied on sections 31(1)(c), 33(1) and 35(1)(b) to refuse access to parts of certain documents. Its decision letter sets out the reasons for its decision.

### Review

3. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
4. The Applicant seeks review of the Agency's decision to exempt certain information in 17 documents and I have examined copies of those documents.
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) 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.

### Section 33(1)

8. 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>1</sup> and
  - (b) such disclosure would be 'unreasonable'.
9. 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.<sup>2</sup>
10. The concept of 'unreasonable disclosure' involves balancing the public interest in the disclosure of official information held by government with the interest in protecting an individual's personal privacy in the circumstances.

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

<sup>2</sup> Section 33(9).

11. 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 its disclosure would, or would be reasonably likely to, endanger the life or physical safety of any person. However, I do not consider this is a relevant factor in the circumstances.
12. 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 on disclosure of the document.<sup>3</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>4</sup>
13. The Agency consulted with certain relevant third parties and I have taken their responses into consideration in my decision below.

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

14. 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>5</sup>
15. 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.<sup>6</sup>
16. A third party's opinion or observations about another person's conduct can constitute information related to the third party's personal affairs.<sup>7</sup>
17. The medical records contain the name, personal views, email addresses and mobile phone numbers capable of identifying a number of third parties. These persons are from the Agency, other health service providers and other agencies.
18. Accordingly, I am satisfied the documents subject to review contain the personal affairs information of individuals other than the Applicant.

*Is disclosure of the personal affairs information unreasonable in the circumstances?*

19. 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.

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<sup>3</sup> Section 33(2B).

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

<sup>5</sup> Section 33(9).

<sup>6</sup> *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].

<sup>7</sup> *Richardson v Business Licensing Authority* [2003] VCAT 1053, cited in *Davis v Victoria Police (General)* [2008] VCAT 1343 at [43], *Pritchard v Victoria Police (General)* [2008] VCAT 913 at [24], *Mrs R v Ballarat Health Services (General)* [2007] VCAT 2397 at [13].

20. In *Victoria Police v Marke*,<sup>8</sup> 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’.
21. In determining whether disclosure of personal affairs information in the documents would be unreasonable in the circumstances, 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 was obtained by the Agency from third parties in the course of the Agency providing health services to the Applicant. Accordingly, disclosure of this information would disclose the identity of third parties who discussed and provided information to the Agency in confidence. In these circumstances, I accept such information is sensitive and personal in nature. 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

The FOI Act provides a general right of access exercisable 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.<sup>9</sup>

In their submission, the Applicant states they seek access to the documents in full to challenge information in the documents. While I acknowledge the Applicant’s personal interest in the documents, I am unable to determine whether disclosure of the documents would be likely to fulfil the Applicant’s purpose. On balance, this factor neither weighs in favour of or against disclosure.

(c) The likelihood of further disclosure of the 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.<sup>10</sup> Accordingly, I must 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 support the view the Applicant would disseminate the information. On balance, this factor neither weighs in favour of or against disclosure.

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

As stated above, I consider the Applicant’s interest in the information would serve a personal interest only rather than any public interest. Rather, I consider there is a public interest in protecting the provision of information provided in confidence to the Agency where it relates to its provision of health and medical services to patients. To disclose such information may in fact be contrary to the public interest in that its disclosure may inhibit third parties from providing relevant information to the Agency. This factor weighs against disclosure.

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<sup>8</sup> [2008] VSCA 218 at [76].

<sup>9</sup> *Victoria Police v Marke* [2008] VSCA 218 at [104].

<sup>10</sup> *Victoria Police v Marke* [2008] VSCA 218 at [68].

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

I note one of the third parties objects to the disclosure of their personal affairs information.

Having regard to the context of this matter, the nature of the information and the objection of the third party, I am satisfied the remaining third parties, whose details the Agency has deleted from the documents, would be reasonably likely to object to the release of their personal affairs information to the Applicant. This factor weighs against disclosure.

- (e) Whether the disclosure of information would, or would be reasonably likely to endanger the life or physical safety of any person<sup>11</sup>

There is no information before me to suggest this is a relevant factor in this case.

22. Having weighed up the above factors, I am satisfied the interest in protecting the personal privacy of the third parties, whose personal affairs information is contained in the documents, outweighs the Applicant's personal interest in disclosure in this instance.
23. Accordingly, I am satisfied the relevant personal affairs information in the documents, is exempt under section 33(1).

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

24. 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?*

25. When determining whether information was communicated in confidence, it is necessary to consider the position from the perspective of the communicator.<sup>12</sup> Further, confidentiality can be express or implied from the circumstances of the matter.<sup>13</sup>
26. Information exempted by the Agency under section 35(1)(b) includes information provided by third parties in the course of the Agency providing medical treatment to the patient.
27. There is nothing on the face of the documents to indicate the information was communicated in confidence. However, a document need not be marked 'confidential' for its content to have been communicated in confidence.<sup>14</sup>
28. The Agency consulted with certain third parties regarding their views on disclosure of information they provided to the Agency. One individual objected to the release of information they provided to the Agency.
29. I am satisfied the information communicated by that person to the Agency was provided in confidence. Having reviewed the documents and the context in which it was provided by the other

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<sup>11</sup> Section 33(2A).

<sup>12</sup> *XYZ v Victoria Police* [2010] VCAT 255 at [265].

<sup>13</sup> *Ibid.*

<sup>14</sup> *Williams v Victoria Police* [2007] VCAT 1194 at [75].

third parties to the Agency, I am satisfied this information was reasonably likely to have been provided in confidence.

*Would disclosure be contrary to the public interest as it would be reasonably likely to impair the ability of the Agency to obtain similar information in the future?*

30. The second condition to be met under section 35(1)(b) is that, disclosure of the information would be contrary to the public interest as it would be reasonably likely to impair the Agency's ability to obtain similar information in the future.
31. This means I must be satisfied, if the information were to be disclosed, it would impair the ability of the Agency to obtain similar information in the future. For example, others in the position of the communicator would be reasonably likely not to provide similar information to the Agency in the future.
32. I accept such information, where it relates to a patient receiving medical treatment by the Agency, particularly in relation to mental health services, by its very nature, will generally be personal and sensitive.
33. In my view, if individuals who provide information to the Agency regarding a patient's health were aware their identity and the information they provide would 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 detrimental for the Agency, which relies on receiving such information to provide timely and necessary medical treatment and health services to patients.
34. In the context of the Agency being a healthcare provider, the voluntary provision of personal and sensitive information in a clinical context is necessary for the Agency to be able to effectively discharge its medical and healthcare functions. Importantly, I also consider the withholding of such information from the Agency would have a detrimental impact on the medical outcomes and wellbeing of patients.
35. 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 in confidence to the Agency by a third party in the interests of a patient's healthcare and wellbeing, outweighs an applicant's personal interest in obtaining access to this information.
36. Accordingly, I am satisfied the relevant information in the documents, is exempt under section 35(1)(b).
37. As I have decided the information the agency deleted from the documents is exempt under either section 33(1) or section 35(1)(b) I have not considered the application of section 31(1)(c) in this matter.

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

38. 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.
39. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'<sup>15</sup> and the effectiveness of the deletions. Where

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<sup>15</sup> *Mickelburgh 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].

deletions would render the document meaningless they are not 'practicable' and release of the document is not required under section 25.<sup>16</sup>

40. I have considered the information the Agency deleted from the documents as irrelevant. I agree it falls outside the scope of the Applicant's request because the record was corrected to remove that information at the time.
41. I have considered the effect of deleting irrelevant and exempt information from the documents. In my view, it is practicable for the Agency to delete the irrelevant and exempt information, because it would not require substantial time and effort, and the edited documents would retain meaning.

### **Conclusion**

42. I am satisfied the documents are exempt under sections 33(1) and 35(1)(b).
43. As I am satisfied it is practicable to edit the documents to delete irrelevant and exempt information in accordance with section 25, I have determined to grant access to the documents in part.
44. The Schedule of Documents in **Annexure 1** sets out my decision in relation to each document.

### **Review rights**

45. 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>17</sup>
46. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.<sup>18</sup>
47. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.<sup>19</sup>
48. 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.
49. 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>20</sup>

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

50. 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>16</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].

<sup>17</sup> The Applicant in section 50(1)(b) and the Agency in section 50(3D).

<sup>18</sup> Section 52(5).

<sup>19</sup> Section 52(9).

<sup>20</sup> Sections 50(3F) and (3FA).

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	Pages	Agency's Decision	OVIC Decision
1.	[date]	Mental Health Progress Notes	1	Released in part Sections 31(1)(c), 33(1), 25	<b>Release in part</b> Sections 33(1), 35(1)(b), 25  The document is to be released with the exempt information deleted by the Agency to remain deleted in accordance with section 25.
2.	[date]	Mental Health Progress Note	1	Released in part Sections 33(1), 25	<b>Release in part</b> Sections 33(1), 25  The document is to be released with the exempt information deleted by the Agency to remain deleted in accordance with section 25.
3.	[date]	Mental Health Exit Correspondence	2	Released in part Sections 33(1), 25	<b>Release in part</b> Sections 33(1), 25  The document is to be released with the exempt information deleted by the Agency to remain deleted in accordance with section 25.
4.	[date]	Mental Health Exit Correspondence	1	Released in part Sections 33(1), 25	<b>Release in part</b> Sections 33(1), 25  The document is to be released with the exempt information deleted by the Agency to remain deleted in accordance with section 25.



Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	Pages	Agency's Decision	OVIC Decision
5.	[date]	Mental Health Email Correspondence	1	Released in part  Sections 33(1), 25	<p><b>Release in part</b></p> <p>Sections 33(1), 35(1)(b), 25</p> <p>The document is to be released with the exempt information deleted by the Agency to remain deleted in accordance with section 25.</p>
6.	[date]	Mental Health Internal Correspondence	1	Released in part  Sections 33(1), 25	<p><b>Release in part</b></p> <p>Sections 33(1), 25</p> <p>The document is to be released with the exempt information deleted by the Agency to remain deleted in accordance with section 25.</p>
7.	[date]	Mental Health Fax Cover Sheet	1	Released in part  Sections 33(1), 25	<p><b>Release in part</b></p> <p>Sections 33(1), 25</p> <p>The document is to be released with the exempt information deleted by the Agency to remain deleted in accordance with section 25.</p>
8.	[date]	Mental Health Forensics Correspondence	1	Released in part  Sections 33(1), 25	<p><b>Release in part</b></p> <p>Sections 33(1), 25</p> <p>The document is to be released with the exempt information deleted by the Agency to remain deleted in accordance with section 25.</p>

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	Pages	Agency's Decision	OVIC Decision
9.	Undated	Referral	1	Released in part Sections 33(1), 25	Release in part Sections 33(1), 25  The document is to be released with the exempt information deleted by the Agency to remain deleted in accordance with section 25.
10.	[date]	Mental Health Progress Note	1	Released in part Sections 33(1), 25	Release in part Sections 33(1), 25  The document is to be released with the exempt information deleted by the Agency to remain deleted in accordance with section 25.
11.	[date]	Mental Health Progress Note	1	Released in part Sections 33(1), 25	Release in part Sections 33(1), 25  The document is to be released with the exempt information deleted by the Agency to remain deleted in accordance with section 25.
12.	[date]	Mental Health Progress Note	1	Released in part Sections 33(1), 25	Release in part Sections 33(1), 25  The document is to be released with the exempt information deleted by the Agency to remain deleted in accordance with section 25.

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	Pages	Agency's Decision	OVIC Decision
13.	[date]	Mental Health Progress Note	1	Released in part Sections 33(1), 25	Release in part Sections 33(1), 25  The document is to be released with the exempt information deleted by the Agency to remain deleted in accordance with section 25.
14.	[date]	Mental Health Progress Note	1	Released in part Sections 33(1), 25	Release in part Sections 33(1), 25  The document is to be released with the exempt information deleted by the Agency to remain deleted in accordance with section 25.
15.	[date]	Mental Health Progress Note	1	Released in part Sections 33(1), 25	Release in part Sections 33(1), 25  The document is to be released with the exempt information deleted by the Agency to remain deleted in accordance with section 25.  I note part of this document has been corrected by the person who made the notes to remove certain information that appears to have been entered into the record in error.
16.	[date]	Screening Reg	1	Released in part Sections 31(1)(c), 33(1),	Release in part Sections 33(1), 25

**Annexure 1 – Schedule of Documents**

<b>Document No.</b>	<b>Date of Document</b>	<b>Document Description</b>	<b>Pages</b>	<b>Agency's Decision</b>	<b>OVIC Decision</b>
				25	The document is to be released with the exempt information deleted by the Agency to remain deleted in accordance with section 25.
17.	[date]	Mental Health Progress Note	1	Released in part Sections 33(1), 35(1)(b), 25	<b>Release in part</b>  Sections 33(1), 35(1)(b), 25  The document is to be released with the exempt information deleted by the Agency to remain deleted in accordance with section 25.