

Notice of Decision and Reasons for Decision

Applicant:	'BK5'
Agency:	Melbourne Health
Decision Date:	31 March 2020
Exemption considered:	Section 35(1)(b)
Citation:	'BK5' and Melbourne Health (<i>Freedom of Information</i>) [2020] VICmr 102 (31 March 2020)

FREEDOM OF INFORMATION – medical records – documents containing material obtained in confidence from 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 document is exempt under section 35(1)(b).

As I am satisfied it is practicable to delete exempt information from the document in accordance with section 25, as per the Agency's decision, I have also determined to grant access to the document in part.

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner

31 March 2020

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency for access to a full copy of their medical record.
2. In its decision, the Agency identified 179 pages falling within the terms of the Applicant's request and decided to grant access to the document in part.
3. The Agency relied on the exemption in section 33(1) to refuse access to one page of the document in part. The Agency's decision letter sets out the reasons for its decision.

Review

4. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access to exempt information in documents.
5. I have examined a copy of a document subject to review.
6. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
7. During the review, the Agency advised section 33(1) was applied in error in its decision and its decision should be the document is exempt under section 35(1)(b).
8. The Applicant was subsequently informed by this office of this clarification and that the Agency relies on section 35(1)(b) to exempt information in the document.
9. I have considered all communications and submissions received from the parties, including:
 - (a) the Agency's decision on the FOI request, dated [date];
 - (b) information provided with the Applicant's review application; and
 - (c) correspondence received from the Agency [on specified dates].
10. 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 exemption

Section 35(1)(b)

11. The Agency applied section 35(1)(b) in part to one page in the document.
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.

Would disclosure divulge information or matter communicated in confidence by or on behalf of a person or a government to an agency or a Minister?

13. Whether information communicated by an individual was communicated in confidence is a question of fact.¹
14. When determining whether information was communicated in confidence, it is necessary to consider the position from the perspective of the communicator.²
15. Confidentiality can be express or implied from the circumstances of a matter.³
16. The document forms part of the Applicant's medical record. It constitutes notes written by Agency staff that relate to the Applicant and an individual other than the Applicant.
17. From my review of the document, I am satisfied the information exempted by the Agency consists of information communicated to the Agency by third parties on voluntarily basis.
18. I have carefully considered information in the documents, in particular, the views of the third party who communicated the information to the Agency.
19. Given the sensitive circumstances surrounding the document, I consider the third party communicated the information to the Agency with an expectation, both their personal affairs information and the information provided about the Applicant, would remain confidential.
20. Accordingly, I am satisfied information in the documents was communicated to the Agency in confidence by third parties.

Would disclosure 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?

21. In deciding whether disclosure of the document would be contrary to the public interest, I must consider whether its disclosure would be reasonably likely to impair the Agency's ability to obtain similar information in the future.
22. I accept the Agency, in its capacity as a health services provider, relies on information provided voluntarily by third parties to plan and provide effective treatment and care to its patients. Such information, by its nature, is generally highly personal, sensitive and confidential.
23. I acknowledge information contained in the documents is important to the Applicant and concerns them. However, if third parties, who provide confidential information to the Agency were aware that information would be disclosed to the patient, they would be reasonably unlikely to, or at least reluctant to, communicate similar information to the Agency in the future.
24. This would be a significant and detrimental outcome, that would impede the ability of the Agency to obtain similar information in the future and provide timely and necessary treatment or intervention.
25. Furthermore, section 35(1)(b) is concerned with protecting the public interest in the free flow of information between agencies and individuals upon whose information it relies. In the context of the Agency, being a hospital, the voluntary provision of sensitive information is often vital to the Agency's ability to effectively discharge its healthcare functions.

¹ *Ryder v Booth* [1985] VR 869 at 883; *XYZ v Victoria Police* [2010] VCAT 255 at [264].

² *Ibid*, XYZ at [265].

³ *Ibid*.

26. In *Debono v Department of Justice FOI Officer*,⁴ the Tribunal upheld the exemption under section 35(1)(b) in relation to information that was provided in confidence by third parties on the physical and psychological condition of the applicant. The Tribunal found third parties would not make reports about the health of others if they were aware their information may be revealed, in particular, to a patient.
27. In these circumstances, I am satisfied disclosure of the information exempted by the Agency in the document would be contrary to the public interest as it would be likely impair the Agency's ability to obtain similar information in the future, which would be a significant and detrimental outcome.
28. Accordingly, I am satisfied the document is exempt under section 35(1)(b).

Deletion of exempt or irrelevant information

29. 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.
30. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'⁵ 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 25.⁶
31. I have considered the effect of deleting the exempt information from the documents in accordance with section 25. As per the Agency's decision, I am satisfied it is practicable to delete such information as to do so does not render the documents meaningless.

Conclusion

32. On the information before me, I am satisfied the document is exempt under section 35(1)(b).
33. As I am satisfied it is practicable to delete exempt information from the document in accordance with section 25, as per the Agency's decision, I have also determined to grant access to the document in part.

Review rights

34. 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.⁷
35. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.⁸
36. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.⁹
37. 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.

⁴ [2008] VCAT 1791

⁵ *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].

⁶ *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].

⁷ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

⁸ Section 52(5).

⁹ Section 52(9).

38. 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.¹⁰

When this decision takes effect

39. 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.

¹⁰ Sections 50(3F) and (3FA).