

Notice of Decision and Reasons for Decision

Applicant:	'BM4'
Agency:	Mornington Peninsula Shire
Decision date:	22 April 2020
Exemption considered:	Section 33(1)
Citation:	'BM4' and Mornington Peninsula Shire (<i>Freedom of Information</i>) [2020] VICmr 119 (22 April 2020)

FREEDOM OF INFORMATION – maternal child health records – health information – personal affairs information – third party information – disclosure unreasonable

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 a document requested by the Applicant under the FOI Act.

My decision on the Applicant's request differs from the Agency's decision in that I have decided to release additional information in the relevant document.

However, I am satisfied certain information in the document is exempt under section 33(1) and certain information the Agency exempted under section 33(1) is irrelevant to the terms of the Applicant's FOI request.

As I am satisfied it is practicable to release a copy of the document with exempt and irrelevant information deleted 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

22 April 2020

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency for access to the following documents:
 - ...FULL copy of the following documents for my [child], [named individual] [date of birth] ...
 - 4 Week Visits
 - 8 Week Visit
 - 4 Month Visit
 - 8 Month Visit
 - 12 Month Visit
 - 18 Month Visit
 - My Growth & Health Record
2. The Agency identified one document, comprising [specified number of] pages, falling within the terms of the Applicant's request. It decided to refuse access to the document in full.
3. The Agency relied on the exemption in section 33(1) to refuse access. 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.
5. I have examined a copy of the 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. I have considered all communications and submissions received from the parties, including:
 - (a) the Agency's decision on the FOI request;
 - (b) the Applicant's submissions dated [date] and information provided with the Applicant's review application;
 - (c) the Agency's submission dated [date]; and
 - (d) all communications between OVIC staff and the Applicant and Agency.
8. In conducting 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.

Submissions

9. In summary, the Agency advised it considered the following factors in making its decision:
 - (a) consultation undertaken with third parties;
 - (b) the content and nature of the personal affairs information in the document;

- (c) whether or not the persons to whom the information relates would object to its release;
- (d) the increase in risk to a primary person's safety; and
- (e) current circumstances with court orders and further pending court proceedings.

Review of exemptions

Section 33(1) – personal affairs information

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
- (a) such disclosure would be 'unreasonable'.

Does the document contain information relating to the 'personal affairs' of persons other than the Applicant?

- 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. A third party's opinion or observations about another person's conduct can constitute information related to a third party's personal affairs.³
- 13. The Agency relied on section 33(1) to exempt names, signatures, telephone numbers, addresses, emails, personal and relationship descriptors, and other identifying information of individuals other than the Applicant (**third parties**). The exempt information includes medical information relating to the Applicant's child and a third party, statements and observations of Agency officers and information provided by third parties to the Agency. A small amount of information in the document contains the personal affairs information of the Applicant.
- 14. Accordingly, I am satisfied information in the document, if released, would disclose information relating to the personal affairs of third parties.

Would the release of the personal affairs information be unreasonable?

- 15. Whether disclosure of personal affairs information would be 'unreasonable' involves balancing the public interest in the disclosure of an official document containing personal affairs information with the interest in protecting a third party's right to personal privacy. These sometimes competing factors, need to be examined in the context of each matter.
- 16. In this case, I have given weight to the following factors:
 - (a) The nature of the personal affairs information

The document contains the opinions and observations of Agency officers and information provided by third parties to the Agency, which I consider was provided and recorded in what would reasonably be expected to be a personal and confidential setting.

¹ Sections 33(1) and (2).

² Section 33(9).

³ *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].

I am constrained in describing the nature of the information exempted by the Agency, as to do so may reveal exempt information. However, having regard to the content of the personal affairs information and setting in which it was provided, I consider this information to be personal, sensitive and confidential in nature. This factor weighs against disclosure.

(b) The circumstances in which the information was obtained

The Agency recorded the information as part of its functions in assessing the development and wellbeing of a child by providing support, information and advice through consultations with the family and other community networks.

I also consider, in order for the Agency to effectively carry out its maternal child and health service functions, it is imperative Agency officers are able to engage with clients and others in a trusted environment in order to obtain information relevant to those functions and necessary for the provision of its health services.

As stated above, I consider the information exempted by the Agency in the document would have been provided and recorded with the reasonable expectation it would be treated in confidence and would not be disclosed to a third party, including under the FOI Act. This factor weighs against disclosure.

(c) The Applicant's interest in the information being disclosed

The Applicant has stated they seek access to medical information as a [parent]. Further, information regarding their child's medical health has been provided when requested from other health organisations.

I acknowledge the Applicant has a strong personal interest in obtaining access to a complete copy of the document. However, given the personal and sensitive nature of the information, that concerns third parties and the circumstances in which it was obtained, as discussed above, I consider the Applicant's personal interest in the information does not outweigh other relevant factors.

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

I accept there is a public interest in individuals accessing official information which concerns the physical health and wellbeing of their child. However, I am equally aware there is a fundamental interest in individuals being able to provide what is often considered private and sensitive information to medical and healthcare providers.

Where this occurs, people need to feel assured the information they provide and is recorded by Agency officers, including the identity of the person providing the information, will be held in confidence by the Agency. If people are not able to speak openly with Agency officers, the provision of appropriate care in a trusted environment is likely to be detrimentally impacted, along with the health and well-being of babies, young children and their parents.

Similarly, medical and healthcare providers should feel confident the professional notes they record for a clinical purpose will not be routinely disclosed under the FOI Act. In such circumstances, I consider it is reasonably likely medical and healthcare providers would be less open in the information they record, which would be likely to result in impaired outcomes for babies, young children and their parents who rely on the Agency's maternal child and health services.

These factors weigh against disclosure.

- (e) Whether the individual whose personal affairs information would, or would be reasonably likely to object to the release of that information

In deciding whether the disclosure of a document under the FOI Act would involve the unreasonable disclosure of personal affairs information of any person other than an applicant, if practicable, the agency must notify the relevant person or persons and seek their views on disclosure.⁴ In this case, the Agency considered it was not practicable to consult with relevant third parties to obtain their views on disclosure of their personal affairs information.

Nonetheless, having reviewed the document and having regard to the circumstances in which the Agency recorded the personal affairs information it contains, I am satisfied certain third parties would be reasonably likely to object to release of their personal affairs information in the document. This factor weighs against disclosure.

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

Finally, in deciding whether disclosure of a document would involve the unreasonable disclosure of a third party's personal affairs information, I must take into account whether disclosure of the information would, or would be reasonably likely to, endanger the life or physical safety of any person. On balance, this factor neither weighs in favour or against disclosure.

17. However, in relation to the personal affairs information of the Applicant's child, I am satisfied the Applicant is the child's parent and they consent to the release of this information. In the circumstances, I am satisfied disclosure of this personal affairs information, which includes general observations and recordings of behaviour and physical health, would not be unreasonable. Accordingly, this information is not exempt under section 33(1).
18. Therefore, on the information before me, with the exception of the personal affairs information of the Applicant's child, I am satisfied it would be unreasonable to release the personal affairs information of other third parties in the documents.
19. Accordingly, I am satisfied certain information in the document is exempt under section 33(1).
20. In undertaking a review under section 49F, I am required by section 49P to make a fresh or new decision. This means my review does not involve determining whether the Agency's original decision is correct, but rather I am required to ensure my fresh decision is the 'correct or preferable decision'.⁵ This involves ensuring my decision is correctly made under the FOI Act and any other relevant applicable law in force at the time of making my decision.
21. Having reviewed the document and the specific terms of the Applicant's FOI request, I am satisfied certain information the Agency exempted under section 33(1) in the document, namely pages [page range] and pages [page range] inclusive, are not relevant to the terms of the Applicant's FOI request.

Section 25 - Deletion of exempt or irrelevant information

22. Section 25 permits an agency to delete information that is exempt, or information regarded as irrelevant to the terms of the request if it is practicable to do so.
23. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'⁶ and the effectiveness of the deletions. Where

⁴ Section 33(2B).

⁵ *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577 at 591.

⁶ *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].

deletions would render a document meaningless, they are not 'practicable', and release of the document is not required under section 25.⁷

24. I have considered the effect of deleting irrelevant and exempt information from the document in accordance with section 25. In my view, I am satisfied it would be practicable to delete this information, as to do so would not require substantial time and effort and the edited document would retain meaning.

Conclusion

25. I am satisfied certain information in the document is exempt under section 33(1).
26. As I am satisfied it is practicable to delete exempt and irrelevant information in the document in accordance with section 25, I have determined to grant access to the document in part.

Review rights

27. 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.⁸
28. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.⁹
29. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹⁰
30. 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.
31. 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.¹¹

Third party review rights

32. If I determine to disclose a document the Agency exempted under section 33(1), if practicable, I must notify any person who has a right to apply to VCAT for review of my decision.¹²
33. The word 'practicable' is not defined in the FOI Act. VCAT has held whether a task is 'practicable' requires the application of 'common sense principles' and the 'exercise of judgment' depending on the circumstances of a matter.¹³ Further, it does not require that 'because a task is possible, it must, ergo, be undertaken'.¹⁴
34. VCAT has also held the possibility of an unnecessary intrusion into the lives of a third party is a relevant consideration when assessing the practicability of notifying them.¹⁵
35. On balance, I am satisfied it is not practicable to notify relevant third parties of their review rights.

⁷ *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].

⁸ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

⁹ Section 52(5).

¹⁰ Section 52(9).

¹¹ Sections 50(3F) and (3FA).

¹² Section 49P(5).

¹³ *Re Schubert and Department of Premier and Cabinet* (2001) 19 VAR 35 at [45].

¹⁴ *Ibid.*

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

When this decision takes effect

36. My decision does not take effect until the Agency's 14 day review period expires, after which the additional information to be released to the Applicant should be disclosed.
37. If a review application is made to VCAT, my decision will be subject to any VCAT determination.