

## Notice of Decision and Reasons for Decision

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Applicant:	'BL2'
Agency:	Ballarat Health Services
Decision date:	8 April 2020
Exemption considered:	Section 33(1)
Citation:	'BL2' and Ballarat Health Services ( <i>Freedom of Information</i> ) [2020] VICmr 108 (8 April 2020)

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FREEDOM OF INFORMATION – medical records – health records – deceased family member – next of kin – personal affairs information – unreasonable disclosure of information

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 I am satisfied it is not practicable to delete exempt information in the document in accordance with section 25, I have determined to refuse access to the documents in full.

My reasons for decision follow.

**Joanne Kummrow**  
Public Access Deputy Commissioner

8 April 2020

## Reasons for Decision

### Background to review

1. The Applicant made a request to the Agency for access to the complete medical records of a deceased family member.
2. In its decision, the Agency refused to grant access to the document in full.
3. The Agency relied on the exemption under section 33(1) to refuse access to the document. 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 copies of the documents 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) information provided with the Applicant's review application;
  - (c) the Agency's confidential submission dated [date]; and
  - (d) communications between OVIC staff, the Applicant and the Agency.
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

#### **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;<sup>1</sup> and
  - (b) such disclosure would be 'unreasonable'.
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.<sup>2</sup>
11. The concept of 'unreasonable disclosure' involves balancing the public interest in the disclosure of official information with the personal interest in privacy in the particular circumstances of a matter.

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

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

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

12. The document relates to the Applicant's family member's medical records. I am satisfied the document relates to the personal affairs information of an individual other than the Applicant.

*Would disclosure be contrary to the public interest?*

13. The concept of 'unreasonable disclosure' involves balancing the competing public interest in disclosure of official information with protecting the personal privacy of an individual other than the applicant. I have considered the following factors in relation to the circumstances of this case:

(a) The nature of the personal affairs information

I consider the health and other information in the medical records to be sensitive and personal in nature. This factor weighs against disclosure.

(b) The extent to which the information is available to the public

I consider the health and other information in the medical records is not publicly available. This factor weighs against disclosure.

(c) The Applicant's interest in the documents

The Applicant advised OVIC staff they seek access to the document to obtain an understanding of their deceased family member's health conditions and to obtain closure following their death. I acknowledge this is a matter that is deeply personal to the Applicant. This factor weighs in favour of disclosure.

(d) Whether the individual to whom the information relates (or their next of kin) objects, or would be likely to object to the release of the information

In its decision, the Agency stated:

This decision has been made following review of the late [name of person]'s medical records and consideration of [their] expressed opinion regarding release of [their] personal information.

Having reviewed the medical records, I confirm the Agency's decision is in line with the opinion expressed by the deceased person. This factor weighs strongly against disclosure.

14. 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.<sup>3</sup> However, I do not consider this to be a relevant factor in this matter.
15. In balancing the above factors, I am satisfied disclosure of sensitive and personal health and other personal affairs information in the medical records and the deceased person's express views on disclosure of such information, as recorded in the document, mean release of such information would be unreasonable.
16. Accordingly, I am satisfied the document is exempt under section 33(1).

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

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

17. 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.
18. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'<sup>4</sup> 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.<sup>5</sup>
19. I have considered the effect of deleting exempt information in the document in accordance with section 25. However, I am satisfied it would not be practicable to do so as it would render the document meaningless.

### **Conclusion**

20. On the information before me, I am satisfied the document is exempt under section 33(1).
21. As I am satisfied it is not practicable to delete exempt information in the document in accordance with section 25, I have determined to refuse access to the documents in full.

### **Review rights**

22. 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>6</sup>
23. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.<sup>7</sup>
24. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.<sup>8</sup>
25. 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.
26. 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>9</sup>

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

27. 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>4</sup> *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].

<sup>5</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>6</sup> The Applicant in section 50(1)(b) and the Agency in section 50(3D).

<sup>7</sup> Section 52(5).

<sup>8</sup> Section 52(9).

<sup>9</sup> Sections 50(3F) and (3FA).