

Notice of Decision and Reasons for Decision

Applicant:	'BQ8'
Agency:	Eastern Health
Decision date:	17 June 2020
Exemption considered:	Section 35(1)(b)
Citation:	'BQ8' and Eastern Health (<i>Freedom of Information</i>) [2020] VICmr 160 (17 June 2020)

FREEDOM OF INFORMATION – health records – medical records – emergency department attendance summary – information communicated in confidence – disclosure contrary to the public interest

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 have determined the document is exempt under section 35(1)(b).

As I am satisfied it is practicable to provide an edited copy of the document in accordance with section 25, I have determined to release the document in part with exempt information deleted.

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner

17 June 2020

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency for access to their medical records.
2. In its decision, the Agency identified one document falling within the terms of the Applicant's request. The Agency relied on the exemption in section 35(1)(b) to refuse access to the document in part. The Agency's decision letters 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. I have examined a copy of the document subject to review.
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;
 - (b) the Applicant's review application and background information provided;
 - (c) the Applicant's submissions received on [date] and [date]; and
 - (d) all communications between the Applicant and the Agency to this office.
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.

Review of the exemption

Section 35(1)(b)

8. A document is exempt under section 35(1)(b) if two conditions are satisfied its disclosure:
 - (a) 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) 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.
9. The document is an Emergency Department Attendance Summary, produced in the course of the Agency providing medical treatment and health services to the Applicant.
10. The Agency relies on section 35(1)(b) to refuse access to certain information on pages 4 and 6. The information exempted by the Agency was provided by a third party to the Agency. I note the deleted information is the same on both pages.

Was the information communicated to the Agency in confidence?

11. When determining whether information was communicated in confidence, it is necessary to consider the position from the perspective of the communicator.¹
12. Confidentiality can be expressed or implied having regard to the circumstances of a particular matter.²
13. There is nothing on the face of the document that expressly indicates the information was provided to the Agency in confidence. However, a document need not be marked 'confidential' for its content to have been communicated in confidence.³
14. Having carefully considered the nature and content of the document, and in particular, the perspective of the third party who communicated the information to the Agency, I am satisfied the information was communicated in confidence.
15. Further, I consider that when information is provided in confidence by third parties to hospital staff, it is often done with an expectation that it will be held in confidence.
16. Accordingly, I am satisfied the information was communicated to the Agency in confidence.

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

17. The Applicant, in their submissions, set out a number of reasons for seeking access to the exempt information, including that access to the information is sought to assist their understanding of the hospital's assessment and outcome, to proceed with the making of 'claims and complaint's as well as being provided an opportunity to 'correct the record'.
18. While I acknowledge the Applicant holds concerns regarding the accuracy of information provided to the Agency by the third party, I note the term 'information' for the purposes of section 35(1) does not require information in a document to be accurate, or even truthful. Instead, my considerations are confined to whether the legal requirements of the relevant exemption are satisfied.
19. In considering the application of section 35(1)(b), the public interest test is narrow and does not permit me to have regard for matters other than those that address the impact disclosure would have on the Agency and its ability to receive information of a similar nature in the future. Other matters, such as any public interest in favour of release, or the extent to which the Applicant's personal interest in the document would be served by being granted access will not generally be considered.
20. I accept such information, where it relates to a patient receiving medical treatment and healthcare by the Agency, particularly in relation to mental health services, by its very nature, will be personal and sensitive information.
21. 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 health services functions.
22. While I accept the Applicant has a genuine interest in obtaining full access to their medical record, however, I also consider that 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

¹ *XYZ v Victoria Police* [2010] VCAT 255 at [265].

² *Ibid.*

³ *Williams v Victoria Police* [2007] VCAT 1194 at [75].

disclosed in response to an FOI request, they would be less likely to communicate similar information to the Agency in future. I believe 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. Importantly, I consider the withholding of such information from the Agency would have a detrimental impact on the medical outcomes and wellbeing of patients.

23. I acknowledge redactions made to documents, particularly when those documents concern health and other personal matters, can create a sense of frustration for an applicant, regardless of whether only a small amount of material is withheld, and an applicant may simply wish for a complete copy of a document without any redactions to any pages.
24. 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 ensuring a patient's health and wellbeing, outweighs the Applicant's personal interest in obtaining access to this information.
25. Accordingly, I am satisfied the information exempted by the Agency is exempt under section 35(1)(b).

Deletion of exempt information

26. 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.
27. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'⁴ 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 25.⁵
28. I have considered the effect of deleting exempt information from the documents in accordance with section 25. I am satisfied it is practicable to provide an edited copy of the document in accordance with section 25, as to do so would not require substantial time and effort and the edited documents would retain meaning.

Conclusion

29. On the information before me, I am satisfied the document is exempt under section 35(1)(b).
30. As I have determined it is practicable to provide the Applicant with an edited copy of the document with exempt information removed in accordance with section 25, the document is to be released in part.

Review rights

31. 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.⁶
32. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.⁷

⁴ *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].

⁵ *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].

⁶ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

⁷ Section 52(5).

33. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.⁸
34. 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.
35. 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.⁹

⁸ Section 52(9).

⁹ Sections 50(3F) and (3FA).