

Notice of Decision and Reasons for Decision

Applicant:	'BR4'
Agency:	Monash Health
Decision Date:	22 June 2020
Exemptions considered:	Sections 33(1) and 35(1)(b)
Citation:	'BR4' and Monash Health (<i>Freedom of Information</i>) [2020] VICmr 165 (22 June 2020)

FREEDOM OF INFORMATION – medical records – personal affairs information – unreasonable disclosure – information obtained 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 differs from the Agency's decision.

I am satisfied certain information in the documents is exempt under sections 33(1) and 35(1)(b).

As I am satisfied it is practicable to release an edited copy of the document with exempt information deleted 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
22 June 2020

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency for access to their complete medical record.
2. In its decision, the Agency identified nine documents falling within the terms of the Applicant's request. The Agency relied on the exemption under section 35(1)(b) to refuse access to the documents in part. The Agency's 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. During the course of the review, the Agency agreed to release further information previously refused under section 35(1)(b) in Document 4. Therefore, this information is no longer subject to review, and should be released by the Agency to the Applicant as a priority upon receipt of this decision.
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) the Applicant's submission dated [date] and information provided with the Applicant's review application;
 - (c) the Agency's submission dated [date]; and
 - (d) all communications between the Agency, the Applicant and OVIC staff.
8. 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

9. 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'.¹ 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 fresh decision.

Section 35(1)(b)

10. 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

¹ *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577 at 591.

(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.

11. When determining whether information was communicated in confidence, it is necessary to consider the position from the perspective of the communicator.² Further, confidentiality can be expressed or implied from the circumstances of the matter.³

Was the information or matter communicated in confidence?

12. The Agency relied on section 35(1)(b) to refuse access to information communicated by third parties to the Agency and information communicated by an Agency officer to a clinician of the Agency, in the course of the Applicant being provided with medical care and treatment.
13. The Agency consulted with the relevant third parties to obtain their views about whether the information was communicated in confidence. The individuals consulted, felt strongly the information they communicated to the Agency was in confidence and objected to its release.
14. Having reviewed the information and considered its sensitive nature, its context, and the purpose for which it was communicated to the Agency by the individuals, I am satisfied the information was communicated in circumstances in which confidentiality could reasonably be implied.
15. Accordingly, I am satisfied disclosure of the information exempted by the Agency would divulge information communicated to the Agency in confidence.

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

16. The fact the information was communicated to the Agency in confidence is not the only consideration in relation to the exemption in section 35(1)(b). Section 35(1)(b) also requires I consider whether the Agency would be impaired from obtaining similar information in the future if the information were to be disclosed under the FOI Act.
17. This means, I must be satisfied that, if the information were to be disclosed, others in the position of the communicator would be reasonably likely not to provide similar information to the Agency in the future.
18. I consider there is an essential public interest in individuals being able to provide sensitive and confidential information about a patient to medical staff in a public health service. Where this occurs, members of the public should feel confident information they provide, including their identity or any identifying information, will be held in confidence by the Agency.⁴
19. Further, in its capacity as a healthcare provider, the Agency relies on individuals to voluntarily provide confidential information in order to effectively diagnose and treat patients. It would be detrimental to the interests of patients if individuals were unable to speak freely and provide information to hospitals and medical staff.
20. In *Debono v Department of Justice FOI Officer*,⁵ the Victorian Civil and Administrative Tribunal (VCAT) upheld the exemption under section 35(1)(b) in relation to information that was provided in confidence by third parties to an agency about the physical and psychological condition of the Applicant. VCAT accepted third parties would be likely to not be forthcoming in the future if they were aware their information may be revealed to a patient.

² *XYZ v Victoria Police (General)* [2010] VCAT 255 at [265].

³ *Ibid.*

⁴ *Maki v Alfred Hospital* (Unreported, VCAT, Davis M, 19 April 2002).

⁵ [2008] VCAT 1791.

21. I acknowledge the Applicant has a strong interest in obtaining full access to their medical records. However, after weighing the above considerations, I am of the view the need to protect sensitive information of this nature outweighs the Applicant's personal interest in obtaining this information in the circumstances.
22. Accordingly, I am satisfied the relevant information in the documents is exempt under section 35(1)(b).
23. However, after reviewing information exempted by the Agency in Document 4, I am not satisfied the communicator would be less likely to provide the same information to the Agency in the future, should this document be released. This information was provided by an Agency officer in the course of providing medical treatment to the Applicant. While I accept the information was provided in confidence, it appears to have been provided to the Agency by an individual as part of their professional duties.
24. Having carefully considered the nature of the information and its sensitivity, I am satisfied it is the personal affairs information of the third party communicator. Therefore, I consider the more appropriate exemption is section 33(1), which I discuss below.
25. The Schedule of Documents in **Annexure 1** sets out my decision in relation to section 35(1)(b) and each of the documents.

Section 33(1)

26. 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; and
 - (b) such disclosure would 'unreasonable'.

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

27. Information relating to a person's 'personal affairs' includes information that identifies any person or discloses their address or location. It includes any information from which such information may be reasonably determined.⁶
28. A third party's opinion or observations about another person's conduct can constitute information related to the third party's personal affairs.⁷
29. I also note, VCAT has interpreted the scope of 'personal affairs information' broadly to include matters relating to health, private behaviour, home life or personal or family relationships of individuals.⁸
30. The document subject to review includes the name, position title, opinion, observations and actions of a third party. Therefore, I am satisfied this information amounts to 'personal affairs information' for the purposes of section 33(1).

⁶ Section 33(9).

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

⁸ *Re F and Health Department* (1988) 2 VAR 458 as quoted in *RFJ v Victoria Police FOI Division* [2013] VCAT 1267 at [103].

Would release of the personal affairs information be unreasonable?

31. The concept of unreasonable disclosure involves balancing the public interest in the disclosure of official information with the protection of personal privacy in the particular circumstances.
32. In determining whether the release of the personal affairs information is unreasonable, I have given weight to the following factors:

(a) The nature of the personal affairs information

Having regard to the content of the personal affairs information and setting in which it was provided, I consider the information is sensitive, personal confidential in nature.⁹ This factor weighs against disclosure.

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

The information provided to the Agency is not publicly available. This factor weighs against disclosure.

(c) The circumstances in which the information was obtained

The information was obtained by the Agency in the course of providing medical treatment to the Applicant. Ordinarily, information provided by Agency officers, who are registered health practitioners in the course of their duties, would not be exempt under section 33(1) as medical professionals are required to give and record their opinions and observations while treating patients. However, having considered the nature of the information, I am satisfied the author had a reasonable expectation it would be treated in confidence and not to be disclosed to a third party, including under the FOI Act. This factor weighs against disclosure.

(d) Whether individuals to whom the information relates consent or object to the disclosure

Having considered the sensitive nature of the information and the circumstances in which it was obtained by the Agency, I am satisfied the information was provided to the Agency with an expectation of privacy. In this instance, the third party advised the Agency they did not consent to the release of their personal affairs information. In the circumstances, I consider this factor weighs against disclosure.

(e) The Applicant's interest in the information including their purpose or motive for seeking access to the document

The FOI Act provides a general right of access that can be exercised by any person, regardless of their motive for seeking access to the document. In this case, I acknowledge that the Applicant has a genuine personal interest in getting access to [their] full medical records.

However, given the personal and sensitive nature of the information and the circumstances in which it was obtained, as discussed above, I consider the Applicant's interest in the information being disclosed does not outweigh these other relevant factors.

(f) Whether any public interest would be promoted by disclosure

The applicant's interest in obtaining this information is a matter of private interest. I do not consider there to be any information before me to suggest that public interest would be promoted by the release of the personal affairs information contained in the document. This factor weighs against disclosure.

⁹ *Page v Metropolitan Transit Authority* [1988] 2 VAR 243 at [246].

- (g) Whether disclosure of the information relating to the personal affairs or any person would or would likely to, endanger the life or physical safety of any person

In determining if release of personal affairs information would be unreasonable, I am required to take into account whether or not disclosure of the personal affairs information would be reasonably likely to endanger the life or physical safety of any person.¹⁰ Having considered the circumstances of the matter, I consider this to be a relevant factor. This factor weighs against disclosure.

33. Having considered the factors set out above, I have determined that it would be unreasonable to release the personal affairs information of third party located on pages 1 and 2 of Document 4. Accordingly, this information is exempt under section 33(1).

Deletion of exempt or irrelevant information

34. 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.
35. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'¹¹ 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 25.¹²
36. I have considered whether it is practicable to provide the Applicant with an edited copy of the document with exempt information deleted from the document in accordance with section 25. I am satisfied it is practicable to delete exempt information from the document, as it would not require substantial time and effort and edited document would retain meaning.

Conclusion

37. On the information before me, I am satisfied certain information in the documents is exempt under sections 33(1) and 35(1)(b).
38. As I am satisfied it is practicable to release an edited copy of the document with exempt and irrelevant information deleted in accordance with section 25, I have determined to grant access to the documents in part.
39. The Schedule of Documents in **Annexure 1** sets out my decision in relation to each document.

Review rights

40. If either party to this review is not satisfied with my decision, they are entitled to apply to the VCAT for it to be reviewed.¹³
41. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹⁴

¹⁰ Section 33(2A).

¹¹ *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].

¹² *Honeywood v Department of Human Services* [2006] VCAT 2048 [26]; *RFJ v Victoria Police FOI Division (Review and Regulation)* [2013] VCAT 1267 at [140] and [155].

¹³ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

¹⁴ Section 52(5).

42. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹⁵
43. 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.
44. 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.¹⁶

When this decision takes effect

45. My decision does not take effect until the Agency's 14 day review period expires.
46. If a review application is made to VCAT, my decision will be subject to any VCAT determination.

¹⁵ Section 52(9).

¹⁶ Sections 50(3F) and (3FA).

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
1.	[Date]	Triage mobilisation report	1	Released in part Section 35(1)(b)	Release in part Sections 35(1)(b), 25	<p>Section 35(1)(b): I am satisfied the information provided by third parties to Agency officers was communicated in confidence and disclosure of this information would be contrary to the public interest, as it would impair the ability of the Agency to obtain similar information in the future. Accordingly, I am satisfied this information is exempt under section 35(1)(b).</p> <p>Section 25: I am satisfied it is practicable to release an edited copy of the document with exempt information deleted in accordance with section 25, I have determined to grant access to the documents in part.</p>
2.	[Date]	Triage mobilisation report	3	Released in part Section 35(1)(b)	Release in part Sections 35(1)(b), 25	Sections 35(1)(b) and 25: See comments for Document 1 above.
3.	[Date]	Triage mobilisation report	3	Released in part Section 35(1)(b)	Release in part Sections 35(1)(b), 25	Sections 35(1)(b) and 25: See comments for Document 1 above.
4.	[Date]	Inpatient progress note	2	Released in part Section 35(1)(b)	Release in part Sections 33(1), 25 On page 1, the last 12 lines are to be released	The Agency no longer relies on section 35(1)(b) to exempt certain information in the document. Having reviewed this information, I am satisfied it is not exempt and is to be released to the Applicant.

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
					to the Applicant.	<p>Section 35(1)(b): As outlined in the notice of decision above, although I am satisfied information exempted by the Agency in the document was communicated in confidence, having considered the circumstances in which it was provided to the Agency I am not satisfied its release would impair the Agency from receiving information of a similar nature in the future. Accordingly, I am not satisfied the information is exempt under section 35(1)(b).</p> <p>Section 33(1): For the reasons set out in the notice of decision above, I am satisfied the exempted information is the personal affairs information of a third party. Further, having considered the nature of the information, I am satisfied its disclosure would be unreasonable and it is exempt under section 33(1).</p> <p>Section 25: See comments for Document 1 above.</p>
5.	[Date]	Triage mobilisation report	1	Released in part Section 35(1)(b)	Release in part Sections 35(1)(b), 25	Sections 35(1)(b) and 25: See comments for Document 1 above.
6.	[Date]	Triage mobilisation report (repeated copy in record, duplicate of	1	Released in part Section 35(1)(b)	Release in part Sections 35(1)(b), 25	Sections 35(1)(b) and 25: See comments for Document 1 above.

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
		document 2)				
7.	[Date]	Triage Information only report	1	Released in part Section 35(1)(b)	Release in part Sections 35(1)(b), 25	Sections 35(1)(b) and 25: See comments for Document 1 above.
8.	[Date]	Triage Information only report	1	Released in part Section 35(1)(b)	Release in part Sections 35(1)(b), 25	Sections 35(1)(b) and 25: See comments for Document 1 above.
9.	[Date]	Triage Information only report	1	Released in part Section 35(1)(b)	Release in part Sections 35(1)(b), 25	Sections 35(1)(b) and 25: See comments for Document 1 above.