

Notice of Decision and Reasons for Decision

Applicant:	'BE1'
Agency:	The Royal Children's Hospital
Decision Date:	5 March 2020
Provision and exemption considered:	Sections 25, 33(1)
Citation:	'BE1' and <i>The Royal Children's Hospital (Freedom of Information)</i> [2020] VICmr 43 (5 March 2020)

FREEDOM OF INFORMATION – medical records – health records – genetic medical condition – personal affairs information of applicant and third party – deletion of irrelevant 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 fresh 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 fresh decision in that I have determined to release additional information in Documents 6 and 8 to the Applicant on grounds I am not satisfied disclosure would be unreasonable under section 33(1) in the circumstances of this matter.

I am satisfied personal affairs information in Document 5 is exempt under section 33(1) and Documents 3 and 4 are not relevant to the terms to the Applicant's request.

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
5 March 2020

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency for access to the following documents:

All medical history including exempt information, redacted information, family history, medical test request & results and correspondence. Details of all treatments provided, including treatment request, product information & invoice. Any published information, including all research performed.
2. In its decision, the Agency identified certain documents falling within the terms of the Applicant's request. It decided to grant access to some of those documents in part.

Review

3. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
4. Section 49M(1) permits an agency to make a fresh decision on an FOI request during a review.
5. On 7 February 2020, the Agency made a fresh decision and released additional information to the Applicant (Documents 1-2 and 7, 9), within the required 28 days under section 49M(2).
6. The Applicant did not agree with the Agency's fresh decision and, as required by section 49MA(2), I proceeded with my review of the fresh decision.
7. I have examined copies of the documents subject to review (Documents 3-6 and 8).
8. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
9. I have considered all communications and submissions received from the parties, including:
 - (a) the Agency's fresh decision and original decision on the FOI request;
 - (b) information provided with the Applicant's review application; and
 - (c) the Agency's submission dated 26 February 2020.
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 exemptions

11. The Agency relied on the exemption under section 33(1) to refuse access to Documents 3 and 4 and parts of Documents 5, 6 and 8. The Agency's decision letter sets out the reasons for its decision.

Section 33(1)

12. 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
- (b) such disclosure would be 'unreasonable'.

13. 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 this may be reasonably determined.²

Documents 3 and 4

- 14. The Agency exempted these two documents in full as personal affairs information in the documents relate to persons other than those specified in the Applicant's request.
- 15. As advised by the Agency, I confirm these documents were mistakenly included on the Applicant's medical file and concern an unrelated person.
- 16. Accordingly, noting the terms of the Applicant's request, I am satisfied these two Documents are irrelevant to the request and are not subject to disclosure.

Documents 5, 6 and 8

Do the documents contain personal affairs information?

- 17. The documents contain the names, relationship descriptors and medical information of persons other than the Applicant.
- 18. I am satisfied the names and relationship descriptors are reasonably capable of identifying third parties, particularly given the information in the document that was released to the Applicant by the Agency.
- 19. Accordingly, I am satisfied these three documents contain personal affairs information.

Would disclosure be unreasonable?

- 20. Whether it would be unreasonable to disclose a document involves balancing the public interest in the disclosure of official information with the interest in protecting the personal privacy of third parties other than the applicant in the particular circumstances of a matter.
- 21. The Agency determined it was not practicable to consult with third parties under section 33(2B) given the age of the documents.
- 22. In *Victoria Police v Marke*,³ the Supreme Court of Victoria Court of Appeal held there is 'no absolute bar to providing access to documents which relate to the personal affairs of others', and the exemption in section 33(1) 'arises only in cases of unreasonable disclosure' and '[w]hat amounts to an unreasonable disclosure of someone's personal affairs will necessarily vary from case to case'.
- 23. Further, '[t]he protection of privacy, which lies at the heart of section 33(1), is an important right that the FOI Act properly protects. However, an individual's privacy can be invaded to a lesser or greater degree'.⁴

¹ Sections 33(1) and (2).

² Section 33(9).

³ [2008] VSCA 218 at [76].

⁴ [2008] VSCA 218 at [79].

24. In determining whether disclosure of the personal information in the document would be unreasonable, I have considered the following factors:

(a) The nature of the personal affairs information and the circumstances in which the information was obtained

The nature of the personal affairs information concerns the provision of health services to the Applicant and a medical procedure undertaken by the Applicant's [family member] and a medical condition concerning the Applicant's [family member].

Having reviewed the information, I consider information concerning the medical procedure undertaken by the Applicant's [family member] is personal and sensitive. Further, it does not relate to the Applicant's genetic medical condition. This factor weighs against disclosure.

However, the remaining information is similar to information already released by the Agency as part of its fresh decision. I consider this information would have been provided and recorded with the reasonable expectation it would be used to treat the Applicant in a health context. This factor weighs in favour of disclosure.

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

While I acknowledge the Applicant's personal interest in seeking access to the information, I consider there is a strong public interest in the personal and sensitive health information of individuals remaining confidential which outweighs the applicant's personal interest in the information. This factor weighs against disclosure.

However, in relation to the remaining information, while no significant public interest factors exist to support disclosure, I do not consider its release would harm the public interest in the circumstances of this matter.

(c) Whether the individuals to whom the information relates object, or would be likely to object, to the release of the information

As noted above, the Agency determined not to consult with third parties relating to the personal affairs information in the documents given the age of the documents.

I note the fact a person, who is consulted regarding their views on disclosure of their personal affairs information, does not object will not necessarily be determinative as to whether information is exempt under section 33(1).⁵

Given the age of the documents and the familial relationship of the third parties to the Applicant, I consider this factor neither weighs in favour or against disclosure.

(d) The Applicant's interest in the information, and whether their purpose for seeking the information is likely to be achieved

The FOI Act provides a general right of access that can be exercised by any person, regardless of their motive or purpose for seeking access to a document. However, the reasons why an applicant seeks access to a document is a relevant consideration in determining whether disclosure would be unreasonable in the circumstances.⁶

The Agency's fresh decision resulted in the Applicant receiving additional information relevant to their genetic medical condition. However, Documents 6 and 8 also contain health

⁵ *McNamara v Deakin University* [2011] VCAT 1089 at [49].

⁶ *Victoria Police v Marke* [2008] VSCA 218 at [104].

information that I am satisfied is relevant to the Applicant's genetic medical condition and family medical history. In these circumstances, I am satisfied disclosure would not be unreasonable given the purpose for which the Applicant seeks it and its relevance to that purpose. This factor weighs in favour of disclosure.

However, I am not satisfied the Applicant's purpose would be served by disclosure of information in Document 5 concerning the medical procedure undertaken by the Applicant's [family member]. This factor weighs against disclosure.

(e) Would disclosure endanger the life or physical safety of any person?

In deciding whether 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.⁷ However, I do not consider this to be a relevant factor in this matter.

25. Having weighed up the above factors, I am satisfied disclosure of the personal affairs information relating to:

- (a) the Applicant's [family member] in Document 5 is unreasonable on grounds it is sensitive and personal and does not relate to the Applicant's genetic medical condition. Accordingly, I am satisfied this information is exempt under section 33(1); and
- (b) the third parties in Documents 6 and 8, is not unreasonable on grounds it is relevant to the Applicant's genetic medical condition and family medical history, its disclosure would serve the Applicant's purpose for seeking access to the information, and the information would have been provided and recorded with the reasonable expectation it would be used to treat the Applicant in a health context. Accordingly, I am not satisfied this information is exempt under section 33(1).

26. **Annexure 1** contains details of my decision with respect to the documents.

Deletion of exempt or irrelevant information

27. Section 25 requires an agency to grant access to an edited copy of a document when it is practicable for the agency to delete exempt or irrelevant information and the applicant agrees to receiving such a copy.

28. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'⁸ 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 25.⁹

29. I have considered the effect of deleting exempt information from Document 5 in accordance with section 25. I am satisfied it is practicable to do so, as the edited documents would retain meaning.

⁷ Section 33(2A).

⁸ *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].

⁹ *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].

Conclusion

30. On the information before me, I am satisfied:
- (a) Documents 3 and 4 are not relevant to the terms to the Applicant's request;
 - (b) the personal affairs information of the Applicant's [family member] in Document 5 is exempt under section 33(1); and
 - (c) the personal affairs information of the Applicant's other family members in Documents 6 and 8 is not exempt under section 33(1).
31. As I am satisfied it is practicable to release an edited copy of Document 5 in accordance with section 25, I have determined to grant access to this document in part.

Other matters

32. Section 49P(5) states, if I decide to disclose a document claimed to be exempt under section 33(1), if practicable, I must notify any person who has a right to apply to VCAT for a review of my decision of their right to do so.
33. In considering the meaning of 'practicable' in relation to other sections of the FOI Act, VCAT has stated the following:

The use of the word 'practicable' in the legislation to my mind connotes a legislative intention to apply common sense principles. 'Practicable' is not a term of art or a term of precise meaning.

.... The use of the word indicates there should be imported into the process the exercise of judgment by the agency concerned. It does not allow for the conclusion that because a task is possible, it must, ergo, be undertaken.¹⁰

34. VCAT also considers the possibility of an unnecessary intrusion into the lives of third parties is relevant when assessing the practicability of notifying them.¹¹
35. I have decided notifying of the next of kin of the individual whose personal information appears in Documents 6 and 8 would be an unnecessary intrusion given the nature and age of the information. As such, I am not satisfied it is practicable to notify the third party's next of kin of their right of review.

Review rights

36. 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.¹²
37. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹³
38. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹⁴

¹⁰ *Re Schubert and Department of Premier and Cabinet* (2001) 19 VAR 35 at [45].

¹¹ *Coulston v Office of Public Prosecutions Victoria* [2010] VCAT 1234 at [42].

¹² The Applicant in section 50(1)(b) and the Agency in section 50(3D).

¹³ Section 52(5).

¹⁴ Section 52(9).

39. 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.
40. 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.¹⁵

When this decision takes effect

41. 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.

¹⁵ Sections 50(3F) and (3FA).

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	Number of Pages	Agency's Fresh Decision	OVIC Decision	OVIC Comments
1.	Unknown	Family History	1	Released in full	Not subject to review	
2.	[date]	Discharge Summary	1	Released in full	Not subject to review	
3.	Unknown	Temperature Chart (Misfiled Document)	1	Refused in full Section 33(1)	Irrelevant Section 25 The information exempted by the Agency under section 33(1) is irrelevant to the Applicant's request and is to remain deleted in accordance with section 25.	Section 25: The Agency deleted parts of this document as it considered the information to be exempt under section 33(1) given it concerns an unrelated third party. However, noting the terms of the Applicant's request, I am satisfied this information is irrelevant to the request and is not subject to disclosure.
4.	[date]	Discharge Sheet 1 (Misfiled Document)	1	Refused in full Section 33(1)	Irrelevant Section 25	Section 25: See comments for Document 3 above.
5.	[date]	Letter to [named third parties]	1	Released in part Sections 33(1), 25	Release in part Sections 33(1), 25 Information exempted by the Agency under section 33(1) is exempt and is to remain deleted in accordance with section 25.	Sections 33(1) and 25: I am satisfied the personal affairs information in this document is exempt under section 33(1) as its disclosure would be unreasonable in the circumstances given it concerns. I am satisfied it is practicable to provide an

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						edited copy of the document with this information deleted in accordance with section 25.
6.	[date]	Letter to [named third party]	1	Released in part Sections 33(1), 25	Release in full	Section 33(1): I am satisfied information exempted by the Agency under section 33(1) relates to the Applicant's genetic medical condition and its disclosure to the Applicant would not be unreasonable in the circumstances.
7.	[date]	Letter to [named third party]		Released in full	Not subject to review	
8.	Unknown	Clinic Note		Released in part Sections 33(1), 25	Release in full	Section 33(1): See comments for Document 6 above.
9.	[date]	Discharge Summary		Released in full	Not subject to review	