

Notice of Decision and Reasons for Decision

Applicant:	'CD1'
Agency:	Ballarat Health Services
Decision date:	25 September 2020
Exemption considered:	Section 35(1)(b)
Citation	'CD1' and Ballarat Health Services (<i>Freedom of Information</i>) [2020] VICmr 275 (25 September 2020)

FREEDOM OF INFORMATION – medical records – information obtained in confidence – section 61B(3) – adequacy of search

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 is the same as the Agency's decision.

I am satisfied the document is exempt under section 35(1)(b).

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

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner
25 September 2020

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency for access to their full medical record from [specified date] onwards.
2. The Agency identified 764 pages (the **document**) falling within the terms of the Applicant's request.
3. The Agency relied on the exemption in section 35(1)(b) to refuse access to nine pages of the document in part; the remained pages were released to the Applicant in full. I note the Agency's decision letter provides minimal 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 to exempt information in the document.
5. I have examined a copy of the relevant pages of the document subject to review, which were released by the Agency in part, being pages 243, 253, 255, 258 and 262-266.
6. I have considered all relevant communications and submissions received from the parties.
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.
8. I note Parliament's intention the FOI Act must be interpreted so as to further the object of the Act and any discretions conferred by the Act must be exercised, as far as possible, so as to facilitate and promote the disclosure of information in a timely manner and at the lowest reasonable cost.

Applicant's concerns regarding adequacy of search and missing documents concerns

9. Alongside their review application, the Applicant raised concerns regarding the Agency's conduct, including missing documents or the content of documents that the Applicant considered had been changed.
10. In accordance with section 61B(3), OVIC determined to address these concerns as part of this review.
11. OVIC made inquiries with the Agency regarding the Applicant's concerns.
12. Based on subsequent telephone communications between OVIC staff and the Applicant to clarify these issues and discuss our findings, I am satisfied the Applicant's key concerns go primarily to the integrity of the Agency's recordkeeping processes rather than the adequacy of the document searches undertaken by the Agency's FOI unit.
13. In making this finding, I consider the substance of these and the Applicant's other confidential concerns may be more appropriately directed to the Health Complaints Commissioner (**HCC**) or another oversight and/or regulatory body. I understand OVIC staff have discussed possible options available to the Applicant. As such, I am satisfied OVIC has pursued the Applicant's concerns to the fullest extent reasonably possible.

Review of exemption

Section 35(1)(b) – information communicated in confidence

14. The Agency relied on section 35(1)(b) to refuse access to information communicated to the Agency by third parties which is recorded in the clinical assessment and progress notes.
15. 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 Minister; and
 - (b) disclosure would be contrary to the public interest as it would reasonably likely impair the ability of an agency or a Minister to obtain similar information in the future.

Would disclosure divulge information or matter communicated in confidence by or on behalf of a person or a government to the Agency?

16. Whether information communicated by an individual was communicated in confidence is a question of fact.¹
17. When determining whether information was communicated in confidence, it is necessary to consider the position from the perspective of the communicator.²
18. Confidentiality can be express or implied from the circumstances of a matter.³
19. The pages subject to review form part of the Applicant's medical record. They constitute notes written by Agency officers that relate to the Applicant and third parties who provided information to the Agency in relation to the Applicant, in the context of their health.
20. I am satisfied the information exempted by the Agency is information communicated to the Agency by third parties on a voluntarily basis.
21. I have carefully considered the information in the document and the context in which it was provided to the Agency and I consider it is reasonably likely the third parties communicated the information to the Agency with an expectation it would remain confidential.
22. Accordingly, I am satisfied information in the document was communicated to the Agency in confidence by third parties.

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

23. In deciding whether disclosure of the information would be contrary to the public interest, I must consider whether its disclosure would be reasonably likely to impair the Agency's ability to obtain similar information in the future.
24. I acknowledge the information deleted in the document by the Agency is important to the Applicant and concerns them.
25. In the context of the Agency, being a hospital, the voluntary provision of sensitive information by third parties is often vital to its ability to effectively discharge its healthcare functions.

¹ *Ryder v Booth* [1985] VR 869 at 883; *XYZ v Victoria Police* [2010] VCAT 255 at [264].

² *Ibid*, XYZ at [265].

³ *Ibid*.

26. By its nature, such information is generally highly personal and confidential. I consider the Agency relies on information of this nature to be provided voluntarily by third parties in order to provide timely and effective treatment and care to its patients.
27. I consider there is an essential public interest in individuals being able to provide what is often sensitive and confidential information about a patient to medical staff in a public health service agency. In turn, I consider medical staff rely on this information to assist the medical treatment of patients under their care.
28. I also consider disclosure of the information would be contrary to the interests of patients in receipt of medical treatment and other health services. If third parties, who provide confidential information to the Agency in relation to patients, were aware information of this nature was routinely disclosed under the FOI Act, they would be reasonably likely to be reluctant to communicate similar information to the Agency in the future.
29. I also am of the view if individuals are unable to speak freely and provide information to medical and other hospital staff, the appropriateness and quality of care that is provided to patients may suffer as a result. I consider this to be a further significant and detrimental outcome for the Agency and similar health providers.
30. In these circumstances, I am satisfied disclosure of the information exempted by the Agency in the document would be contrary to the public interest as it would be likely to impair the Agency's ability to obtain similar information in the future.
31. Accordingly, I am satisfied information on pages 243, 253, 255, 258 and 262-266 of the document is exempt under section 35(1)(b).

Deletion of exempt or irrelevant information

32. 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.
33. 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
34. In light of the Agency's decision to provide access to the document in part with exempt information deleted in accordance with section 25, I am satisfied it is practicable to provide the Applicant with access to an edited copy of the document.

Conclusion

35. On the information before me, I am satisfied certain information in the document, as deleted by the Agency, is exempt under section 35(1)(b).
36. As I am satisfied it is practicable to delete exempt information from the document in accordance with section 25, as per the Agency's decision, I have also determined to grant access to the document in part.
37. Accordingly, my decision in this matter is the same as the Agency's decision.

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].

Review rights

38. If the Applicant 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 However, any application for review will not extend to concerns further documents exist that were not identified by the Agency or the other matters addressed at paragraphs 9-13 above.
39. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.⁷
40. 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.
41. 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.⁸

When this decision takes effect

42. My decision does not take effect until the Applicant's review period (stated above) expires. If a review application is made to VCAT, my decision will be subject to any VCAT determination.

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

⁷ Section 52(5).

⁸ Sections 50(3F) and (3FA).