

Notice of Decision and Reasons for Decision

Applicant:	'CD9'
Agency:	Monash Health
Decision date:	30 September 2020
Exemptions considered:	Sections 30(1), 33(1)
Citation:	'CD9' and Monash Health (<i>Freedom of Information</i>) [2020] VICmr 285 (30 September 2020)

FREEDOM OF INFORMATION – medical records – deliberative process – disclosure contrary to the public interest – personal affairs information – unreasonable disclosure

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.

I am satisfied certain information in the documents is exempt under section 33(1). However, I further consider information in Document 2 is exempt under section 30(1).

As I am satisfied it is practicable to delete exempt information from the documents in accordance with section 25, I have determined to grant access in part.

However, I am not satisfied it is practicable to provide the Applicant with edited copy of Document 2, with exempt information deleted in accordance with section 25. Therefore, I have refused access to the document in full.

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

30 September 2020

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency for access to their complete medical record from [specified date] onwards.
2. In its decision, the Agency relied on section 33(1) to refuse access in part to seven documents that fell within the terms of the Applicant's request. Its 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 to the documents.
4. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
5. I have examined a copy of the documents subject to review and considered all relevant communications received from the parties in relation to this review.
6. 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.
7. I note Parliament's intention the FOI Act must be interpreted so as to further the object of the Act and that 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.
8. Section 49F provides I 'may review the decision that is the subject of the application for review', while section 49P provides I 'must make a fresh decision on the original application'. 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 was correct, 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 my decision.

Review of exemption

Section 33(1) – Personal affairs information

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;² and
 - (b) such disclosure would be 'unreasonable'.

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

² Sections 33(1) and (2).

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

10. 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.³
11. A third party's opinion or observations about another person's conduct can constitute information related to the third party's personal affairs.⁴
12. I also note that 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.⁵
13. The documents subject to review includes the name, position title, opinion, observations and actions of third parties. Therefore, I am satisfied this information amounts to 'personal affairs information' for the purposes of section 33(1).

Would disclosure of the personal affairs information be unreasonable?

14. 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.
15. 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.⁶

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

The information provided to the Agency is not publicly available.

(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 authors had a reasonable expectation it would be treated in confidence and not to be disclosed to a third party, including under the FOI Act.

(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.

³ Section 33(9).

⁴ *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].

⁵ *Re F and Health Department* (1988) 2 VAR 458 as quoted in *RFJ v Victoria Police FOI Division* [2013] VCAT 1267 at [103].

⁶ *Page v Metropolitan Transit Authority* [1988] 2 VAR 243 at [246].

I am also satisfied that it was not practicable in the circumstances to seek the views of third parties in relation to the disclosure of their personal information. Having considered the nature of the information, I am satisfied certain individuals would object to 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 documents.

- (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.⁷ Having considered the circumstances of the matter, I consider this to be a relevant factor.

16. Having considered the factors set out above, I have determined that it would be unreasonable to release the personal affairs information of third parties located in the documents. Accordingly, this information is exempt under section 33(1).
17. However, I am not satisfied all information exempted by the Agency in Document 2 is personal affairs information of third parties. In some instances, the information only concerns personal affairs of the Applicant. Accordingly, I am not satisfied all information would meet the first limb of the exemption.
18. Nonetheless, given the nature of the information in Document 2 and its relation to the deliberative functions of the Agency, I consider section 30(1) to be the more appropriate exemption in the circumstances.

Section 30(1)

19. A document is exempt under section 30(1) if the following three conditions are met:
- (a) the document discloses matter in the nature of opinion, advice or recommendation prepared by an officer or Minister or consultation or deliberation that has taken place between officers, Minister or an officer and a Minister;
 - (b) such matter must be made in the course of, or for the purpose of, the deliberative processes involved in the functions of an agency or Minister or of the government; and
 - (c) disclosure of the matter would be contrary to the public interest.

⁷ Section 33(2A).

20. The exemption does not apply to purely factual matter in a document.⁸
21. The term 'officer of an agency' is defined in section 5(1). It includes a member of the agency, a member of the agency's staff, and any person employed by or for the agency, whether that person is one to whom the provisions of the *Public Administration Act 2004* (Vic) apply or not.
22. The words 'opinion, advice or recommendation' convey a meaning of matters in the nature of a 'personal view', 'an opinion recommended or offered' or a 'presentation worthy of acceptance'.⁹
23. It is not necessary for information in a document to be in the nature of opinion, advice or recommendation. Rather, its release must disclose information of that nature.
24. Determining whether disclosure of a document would be contrary to the public interest involves a 'process of the weighing against each other conflicting merits and demerits' of disclosure.¹⁰

Do the documents disclose matter in the nature of opinion, advice or recommendation, or consultation or deliberation?

25. Having carefully reviewed Document 2, I am satisfied certain information conveys the opinions and advice of Agency officers, and also consultation and deliberation that has taken place between Agency officers.

Were the opinions, advice, recommendations disclosed in the document provided in the course of, or for the purpose of, the deliberative processes of the Agency?

26. The term 'deliberative process' has been interpreted widely. In *Re Waterford and Department of Treasury (No. 2)*,¹¹ the Commonwealth Administrative Appeals Tribunal held:

... "deliberative processes" [is] wide enough to include any of the processes of deliberation or consideration involved in the functions of an agency... In short, ... its thinking processes – the processes of reflection, for example, upon the wisdom and expediency of a proposal, a particular decision or a course of action.
27. I am satisfied the opinions, advice and recommendations expressed by Agency officers was provided the course of, and for the purpose of, the Agency's deliberative processes with respect to managing the health care of the Applicant as well as the Agency's ongoing engagement with, the Applicant.

Would disclosure of the documents be contrary to the public interest?

28. The third requirement to be met under section 30(1) is that disclosure of the document would be contrary to the public interest.
29. In deciding whether the information exempted by the Agency would be contrary to the public interest, I have given weight to the following relevant factors:¹²
 - (a) the right of every person to gain access to documents under the FOI Act;
 - (b) the degree of sensitivity of the issues discussed in the documents and the broader context giving rise to the creation of the documents;

⁸ Section 30(1).

⁹ *Halliday v Office of Fair Trading* (unreported, AAT of Vic, Coghlan PM, 20 July 1995).

¹⁰ *Sinclair v Maryborough Mining Warden* [1975] HCA 17; [1975] 132 CLR 473 at [485], adopted in *Department of Premier and Cabinet v Hulls* [1999] VSCA 117 at [30].

¹¹ [1981] 1 AAR 1.

¹² *Hulls v Victorian Casino and Gambling Authority* (1998) 12 VAR 483.

- (c) the stage of a decision or status of policy development or a process being undertaken at the time the communications were made;
 - (d) whether disclosure of the documents would be likely to inhibit communications between agency officers, essential for the agency to make an informed and well-considered decision or participate fully and properly in a process in accordance with the agency's functions and other statutory obligations;
 - (e) whether disclosure of the documents would give merely a part explanation, rather than a complete explanation for the taking of a particular decision or the outcome of a process, which the agency would not otherwise be able to explain upon disclosure of the documents; and
 - (f) the public interest in the community being better informed about the way in which the agency carries out its functions, including its deliberative, consultative and decision-making processes and whether the underlying issues require greater public scrutiny.
30. On the information before me, I am satisfied release of the advice, opinions and recommendations provided for a deliberative function of the Agency would be contrary to the public interest for the following reasons:
- (a) Medical information is highly personal and sensitive nature. In this matter, certain information is sensitive in that it relates directly to the medical care and condition of the Applicant. The information also relates to broader issues, including the identification of risks in the effective treatment of the Applicant, rather than just a clinical assessment of the Applicant.
 - (b) Agency officers need to be able to raise concerns regarding systemic issues involved in the coordination and management of vulnerable patients. Should this information be routinely released under the FOI Act, it is likely Agency staff will feel constrained in the way in which they are able to raise and communicate such concerns. This could have serious negative consequences in relation to the general coordination of care in situations where multiple healthcare providers are involved in a person's treatment.
 - (c) While I accept that officers of the Agency are professionally required to provide their opinions and comments with respect to managing patient treatment and healthcare, I also consider there is a public interest in them being able to record details of discussions with other Agency officers without concern such information will be disclosed to patients under the FOI Act. While I acknowledge the Applicant's strong personal interest in the document, I am also mindful of ensuring the Agency has access to all relevant information to inform its clinical decisions. Therefore, I am satisfied the impact of routinely disclosing documents of this nature would undermine the robustness of the Agency's process in developing patient plans.
 - (d) I am not satisfied disclose of the information would result in the community being better informed about the way in which the Agency carries out its functions, including its deliberative, consultative and decision making processes.
31. On balance, I am satisfied it would be contrary to the public interest to release the document on grounds that it would have an adverse effect on the integrity or effectiveness of a decision-making process of the Agency. Accordingly, I am satisfied Document 2 is exempt under section 30(1).

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 an 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'¹³ 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 25.¹⁴
34. I have considered whether it is practicable to release an edited copy of Document 2, with exempt information deleted in accordance with section 25. Having considered the terms of the Applicant's request, in my view, it is not practicable as deletion of the exempt information would render the document meaningless for the purpose for which the Applicant seeks a copy of the information.

Conclusion

35. On the information before me, I am satisfied parts of the documents are exempt under section 33(1). I further consider that information in Document 2 is exempt under section 30(1).
36. As I am satisfied it is practicable to delete exempt information from the documents in accordance with section 25 and I have determined to grant access in part.
37. However, as I am not satisfied it is practicable to provide the Applicant with an edited copy of Document 2, with exempt information deleted in accordance with section 25, I have refused access to the document in full.
38. The Schedule of Documents in **Annexure 1** sets out my decision in relation to each document.

Review rights

39. If the Applicant is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.¹⁵ Any such application must be made to VCAT within 60 days from the date the Applicant receives this Notice of Decision.¹⁶
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 an application is made to VCAT for a review of my decision.¹⁷

¹³ *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].

¹⁴ *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].

¹⁵ Section 50(1)(b).

¹⁶ Section 52(5).

¹⁷ Sections 50(3F) and (3FA).

Annexure 1 – Schedule of Documents

No.	Date	Document	Pages	Agency Decision	OVIC Decision	Comments
1.	[Date]	Triage Assessment Report	1	Released in part Section 33(1)	Release in part Section 33(1)	Section 33(1): For the reasons set out above, I am satisfied the personal affairs information of third parties contained in the document is exempt and is to remain deleted.
2.	[Date]	Threat assessment Report	4	Refused in full Section 33(1)	Refuse in full Sections 30(1), 33(1)	<p>Section 30(1): I am satisfied the document contains the advice, opinion and recommendations of an Agency officer provided in the course of, and for the purpose of, the Agency’s deliberative processes with respect to managing the health care of the Applicant as well as the Agency’s ongoing engagement with, the Applicant. For the reasons set out above, I am satisfied it would be contrary to the public interest to release the advice, opinion and recommendations contained in the document.</p> <p>Section 33(1): See comments in Document 1.</p> <p>Section 25: I have considered whether it is practicable to provide the Applicant with an edited copy of the document with exempt information deleted under section 25. In this case, I am not satisfied it would be practicable as deletion of exempt material would render the document meaningless.</p>

Annexure 1 – Schedule of Documents

No.	Date	Document	Pages	Agency Decision	OVIC Decision	Comments
3.	[Date]	Triage Information	2	Released in part Section 33(1)	Release in part Section 33(1)	Section 33(1): See comments in Document 1.
4.	[Date]	Triage Information	2	Released in part Section 33(1)	Release in part Section 33(1)	Section 33(1): See comments in Document 1.
5.	[Date]	Triage Information	2	Released in part Section 33(1)	Release in part Section 33(1)	Section 33(1): See comments in Document 1.
6.	[Date]	Triage Information	2	Released in part Section 33(1)	Release in part Section 33(1)	Section 33(1): See comments in Document 1.
7.	[Date]	Triage Information	1	Released in part Section 33(1)	Release in part Section 33(1)	Section 33(1): See comments in Document 1.