



Office of the Victorian  
Information Commissioner

t 1300 00 6842  
e [enquiries@ovic.vic.gov.au](mailto:enquiries@ovic.vic.gov.au)  
w [ovic.vic.gov.au](http://ovic.vic.gov.au)

PO Box 24274  
Melbourne Victoria 3001

## Notice of Decision and Reasons for Decision

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Applicant:	'CO5'
Agency:	Northern Health
Decision date:	28 January 2021
Exemptions and provisions considered:	Sections 33(1), 35(1)(b) and 38 in conjunction with section 141(2) of the <i>Health Services Act 1988</i> (Vic)
Citation:	'CO5' and <i>Northern Health (Freedom of Information)</i> [2021] VICmr 22 (28 January 2021)

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FREEDOM OF INFORMATION – medical records – health records – deceased parent – senior available next of kin – information provided to agency in confidence – personal affairs information of third parties – *Health Services Act 1988* (Vic) – *Human Tissue Act 1982* (Vic)

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 a document requested by the Applicant under the FOI Act.

My decision on the Applicant's request differs from the Agency's decision in that I have determined to release additional information to the Applicant.

While I am satisfied certain information in the document is exempt under sections 33(1) and 35(1)(b), I am not satisfied the document is exempt under section 38 of the FOI Act in conjunction with section 141(2) of the *Health Services Act 1988* (Vic).

**Annexure 1** sets out my decision in relation to the document.

My reasons for decision follow.

**Joanne Kummrow**

Public Access Deputy Commissioner

28 January 2021

## Reasons for Decision

### Background to review

1. The Applicant made a request under the FOI Act to the Agency seeking access to their deceased [parent's] medical records (**deceased person**).
2. The Agency did not to process the request on the basis it considered the Applicant did not meet the requirements for being the deceased person's next of kin.

### Review

3. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access to the requested documents.

### Preliminary view

4. On [date], OVIC staff provided the Agency with my preliminary view, noting the Agency did not clearly set out its reasons for refusing access to the requested documents, as required by section 27(1) and 8.2 of the Professional Standards issued by the Information Commissioner under Part IB of the FOI Act. The Agency was invited to provide a submission to address the matters raised or make a fresh decision under section 49M(1).

### Agency's fresh decision

5. On [date], the Agency advised OVIC of its intention to make a fresh decision.
6. On [date], the Agency made a fresh decision in which it determined to release two pages of the deceased person's medical records to the Applicant, and refuse access to the remaining pages under section 38 of the FOI Act in conjunction with the *Health Services Act 1988* (Vic) (**Health Services Act**).
7. While I note the Agency's fresh decision references section 49L, the correct provision under which the Agency made its fresh decision is section 49M.
8. The Applicant did not agree with the Agency's fresh decision and, as required by section 49MA(2), I proceeded with to review the fresh decision.
9. In consultation with OVIC staff, the Applicant narrowed the information subject to review to that within the date range of [date range] (the **document**).
10. I have examined a copy of the document.
11. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
12. I have considered all communications and submissions received from the parties.
13. 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.
14. 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.

15. In conducting a review under section 49F of the FOI Act, section 49P requires that I make a new or 'fresh decision'. Therefore, my review does not involve determining whether the Agency's decision is correct, but rather requires my fresh decision to be the 'correct or preferable decision'.<sup>1</sup> This involves ensuring my decision is correctly made under the FOI Act and any other applicable law in force at the time of my decision.
16. The Agency's fresh decision does not specify the relevant secrecy provision in the Health Services Act upon which it refused access to the document under section 38 of the FOI Act.
17. Having reviewed the document and information provided by the Agency, I consider the Agency seeks to rely on section 38 in conjunction with section 141(2) of the Health Services Act.

## **Review of exemptions**

### ***Section 38 – Secrecy provision***

18. A document is exempt under section 38 if:
  - (a) there is an enactment in force;
  - (b) that applies specifically to the kind of information in the document; and
  - (c) the enactment must prohibit persons, referred to in the enactment, from disclosing that specific kind of information (either absolutely or subject to exceptions or qualifications).
19. For section 38 to apply to an enactment, the enactment must be formulated with such precision that it specifies the actual information sought to be withheld.
20. Section 141 of the Health Services Act states in part:

...

  - (2) A relevant person must not, except to the extent necessary—
    - (a) to carry out functions under this or any other Act; or
    - (b) to exercise powers under this or any other Act in relation to a relevant health service; or
    - (c) to give any information he or she is expressly authorised, permitted or required to give under this or any other Act—

give to any other person, whether directly or indirectly, any information acquired by reason of being a relevant person if a person who is or has been a patient in, or has received health services from, a relevant health service could be identified from that information.

Penalty: 50 penalty units.
  - (2A) For the purposes of subsection (2)(c), "any other Act" does not include the Health Privacy Principles in the Health Records Act 2001 or Part 3 or Part 5 of that Act.
  - (2B) Subsection (2) does not apply to a person (other than an independent contractor) who is a relevant person in relation to a relevant health service who gives information in accordance with HPP 2 of the Health Privacy Principles in the Health Records Act 2001 to another person (other than an independent contractor) who is a relevant person in relation to that relevant health service.

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

*Is there an enactment in force?*

21. I am satisfied the Health Services Act is an enactment in force for the purposes of section 38.

*Does the Health Services Act apply specifically to information in the document?*

22. The document subject to review is part of the deceased person's medical record.

23. In relation to the application of section 141(2), I am satisfied:

- (a) the Agency is a 'relevant health service', being a 'public hospital', as defined in the Health Services Act,<sup>2</sup> for the purposes of section 141(2);
- (b) Agency officers are 'relevant persons', being persons employed or engaged by a relevant health service; and
- (c) the information exempted by the Agency in the document identifies a person other than the Applicant who was a patient of, or received health services from, the Agency.

24. Therefore, I am satisfied section 141(2) of the Health Services Act specifically applies to the document.

*'Senior available next of kin'*

25. Section 141(3) of the Health Services Act sets out exceptions to the prohibition under section 141(2) of giving a patient's medical information to a third party, including:

- (a) to the giving of information with the prior consent (which may be express or implied) of the person to whom it relates or, if that person has died, with the consent (which may be express or implied) of the **senior available next of kin** of that person [emphasis added]

....

26. Section 3(1) of the Health Services Act provides 'senior available next of kin' has the same meaning as in the *Human Tissue Act 1982 (Vic) (Human Tissue Act)*.<sup>3</sup>

27. 'Senior available next of kin' is defined in the Human Tissue Act to mean:

...

- (b) in relation to any other deceased person—
  - (i) where the person, immediately before the person's death, had a spouse or domestic partner and that spouse or domestic partner is available—the spouse or domestic partner;
  - (ii) where the person, immediately before the person's death, did not have a spouse or domestic partner or the spouse or domestic partner is not available—**a son or daughter of the person who has attained the age of 18 years and who is available**; [emphasis added]
  - (iii) where no person referred to in subparagraph (i) or (ii) is available but a parent of the person is available—that parent; or
  - (iv) where no person referred to in subparagraph (i), (ii) or (iii) is available—a brother or sister of the person who has attained the age of eighteen years and is available.<sup>4</sup>

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<sup>2</sup> *Health Services Act*, section 3(1).

<sup>3</sup> The *Human Tissue Act* deals with the removal of human tissue from a person, whether or not that person is alive or deceased. The Act gives certain authority to the senior available next of kin in circumstances where the person from whom the tissue is removed is incapable of providing consent.

28. Therefore, the definition of 'senior available next of kin' provides for a hierarchy of persons, subject to the descending categories of person and the age and availability of a person within the hierarchy and relevant category.<sup>5</sup>
29. While I note the phrase 'senior available next of kin' includes the word 'senior', I do not interpret this to necessarily mean a deceased person's children in descending order based on their age. In the case of 'a son or daughter', other than a child of a deceased person being over 18 years and available, the definition does not expressly prescribe a priority amongst children where there is more than one child who is over 18 years and available.
30. As such, I consider the definition of 'senior available next of kin' does not require there to be one senior available next of kin only, where more than one person meets the requirements of age and availability. Accordingly, I consider there may be situations in which there is more than one 'senior available next of kin', for the purposes of the Human Tissue Act and the Health Services Act.
31. I acknowledge this interpretation may require a health service to consult with more than one child of a deceased person where the consent of the 'senior available next of kin' is required. However, in the absence of a spouse or domestic partner, consultation by a health service with children engaged in their parent's medical care is a common occurrence. However, I also acknowledge there will be cases where it is clear that a deceased person has one 'senior available next of kin' only.
32. In this matter, where the deceased person did not have a spouse or domestic partner immediately before their death, the next person in the hierarchy of 'senior available next of kin' is 'a son or daughter of the person who has attained the age of 18 years and who is available'.
33. In my view, while the Applicant has an elder sibling, I do not consider Parliament intends section 141(2) to be interpreted so as to preclude more than one child of the deceased person accessing their deceased parent's medical records under the Health Services Act and the FOI Act where another child of the deceased person meets the age and availability requirements and in the absence of information demonstrating the deceased person expressly appointed or intended the Applicant's elder sibling (or another child) to be the senior available next of kin.
34. The Agency was advised of the above interpretation as part of my preliminary view. The Agency responded it 'has no obligation to follow OVIC's opinion on the definition of [next of kin]' and that it determined the Applicant's older [sibling], 'the eldest [child] to be the only NOK [next of kin]'. The Agency advised this position was based in part on the age of this person, and on information from the health service (by way of treatment decisions) and the patient prior to their death.
35. As discussed above, I do not accept the age of a deceased person's child is a determinative factor when determining if they are the 'senior available next of kin' for the purposes of the Health Services Act. In these circumstances and having reviewed the deceased person's medical record, I find conflicting information in the treatment decisions and in relation to the potential views of the patient on this issue.
36. Despite the Agency's response to the preliminary view and its interpretation of section 141(2) of the Health Services Act and its application to the document, I note it nevertheless released part of the document to the Applicant.
37. On the information before me, I make the following material findings of fact:

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<sup>4</sup> *Human Tissue Act*, section 3(1).

<sup>5</sup> See *Vernon* [2020] NSWSC 608.

- (a) The Applicant made a request to the Agency for the medical records of the deceased person.
  - (b) Prior to their death, the deceased person did not have a spouse or domestic partner.
  - (c) The Applicant is an adult child of the deceased person, being over 18 years.
  - (d) I have been provided with limited information regarding the deceased person's views towards the Applicant. However, from a review of the records subject to review, I am satisfied the Applicant took an active interest in their [parent's] medical condition.
  - (e) Lastly, from the medical records, I note certain matters are raised in relation to the Applicant's relationship with their [parent], which I am unable to determine in this review.
38. I have carefully considered the operation of section 141(2) of the Health Services Act and the definition of 'senior available next of kin'.
39. In this case, I am not satisfied section 141(2) of the Health Services Act prohibits disclosure of information in the document to the Applicant, as the definition does not, in my view, preclude more than one adult child of a deceased person, and who is available, accessing their medical records under the FOI Act as:
- (a) the Applicant meets the age and availability requirements of the definition of 'senior available next of kin' in the Human Tissue Act; and
  - (b) there is no information before me the deceased person expressly excluded, or intended to exclude, the Applicant, as one of their adult children, from accessing their medical record.
40. Accordingly, I am not satisfied the document is exempt under section 38 of the FOI Act in conjunction with section 141(2) of the Health Services Act.
41. Given my decision in relation to section 38, I have considered whether the document is otherwise exempt under sections 33(1) and 35(1)(b). I first consider the application of section 35(1)(b) followed by section 33(1) below.

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

42. 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?*

43. Whether information communicated by an individual was communicated in confidence is a question of fact.<sup>6</sup>
44. When determining whether information was communicated in confidence, it is necessary to consider the position from the perspective of the communicator.<sup>7</sup>

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<sup>6</sup> *Ryder v Booth* [1985] VR 869 at 883; *XYZ v Victoria Police* [2010] VCAT 255 at [264].

<sup>7</sup> *XYZ v Victoria Police* [2010] VCAT 255 at [265].

45. Confidentiality can be express or implied from the circumstances of a matter.<sup>8</sup>
46. Having carefully considered the nature and content of the document and, in particular, the perspective of the third parties who communicated information to the Agency, I am satisfied certain information was communicated in circumstances where confidentiality could reasonably be implied.
47. Further, I consider when information is provided in confidence by third parties to hospital staff, it is often done with an expectation it will be held 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?*

48. The public interest test in section 35(1)(b) is narrow. It does not permit me to have regard to 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.
49. 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.
50. I accept the Applicant has a genuine personal interest in obtaining full access to the document. However, if individuals who provide information to the Agency regarding a patient's health and wellbeing were aware their identity and the information they provide would be routinely disclosed in response to an FOI request, I consider they would be less likely to communicate similar information to the Agency in future. This would be detrimental for the Agency, which I accept relies on receiving such information to provide timely and effective clinical care to patients.
51. Accordingly, I am satisfied disclosure of certain information in the document would be contrary to the public interest in that it would impair the Agency's ability to receive information of a similar nature in the future, and is exempt under section 35(1)(b).
52. **Annexure 1** sets out details of my decision in relation to section 35(1)(b).

### ***Section 33(1) – personal affairs information***

53. 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;<sup>9</sup> and
  - (a) such disclosure would be 'unreasonable'.
54. The exemption continues to apply to a person who is deceased.<sup>10</sup>

*Does the document contain personal affairs information of individuals other than the Applicant?*

55. Information relating to an individual's 'personal affairs' includes information that identifies any person or discloses their address or location. It also includes any information from which such information may be reasonably determined.<sup>11</sup>

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<sup>8</sup> Ibid.

<sup>9</sup> Sections 33(1) and (2).

<sup>10</sup> Section 33(1).

<sup>11</sup> Section 33(9).

56. A document will disclose a third party's personal affairs information if it is capable, either directly or indirectly, of identifying that person. As the nature of disclosure under the FOI Act is unrestricted and unconditional, this is to be interpreted by reference to the capacity of any member of the public to identify a third party.<sup>12</sup>
57. Having reviewed the document, I am satisfied it contains the personal affairs information of persons other than the Applicant including, medical information, names, addresses, mobile and landline telephone numbers, telephone extension numbers, position titles, signatures, relationship descriptors and other identifying information of persons other than the Applicant (**third parties**).

*Would disclosure of the personal affairs information be unreasonable?*

58. Consideration of whether disclosure of a document would be unreasonable involves balancing the public interest in the disclosure of official information with the interest in protecting the personal privacy of a third party in the circumstances.
59. The information in the document relates almost exclusively to the personal affairs of the deceased person. There is also information of other third parties in the medical records, including medical staff that treated and cared for the Applicant's [parent], as well as information about the Applicant's family members.
60. As is clear from the operation of section 141(2) of the Health Services Act, information in a person's medical record must be treated with a high level of confidentiality and release to a third party must be carefully considered in accordance with that Act, and also under the FOI Act given that a person's medical record contains personal and sensitive information.
61. In relation to the personal affairs information of Agency officers, in my view, subject to an agency demonstrating special circumstances apply, I consider it would not be unreasonable to disclose the personal affairs information of Agency officers where they are carrying out their usual duties and responsibilities and where the information reflects them carrying out their routine professional duties. The nature of such information is to be contrasted with information relating to an individual in their personal or private capacity.
62. In this case, I do not consider it would be unreasonable to release the personal affairs information of Agency officers in the document. The information is not particularly sensitive, in that it only records names, initials and occasionally the titles of medical staff and does no more than reveal those persons in the context of performing their usual professional duties.
63. However, I consider it would be unreasonable to disclose direct landline, mobile telephone numbers, email addresses and the signatures of medical staff as this information is not generally publicly available and its disclosure would not further the Applicant's understanding of the document or the purpose for which they seek access to the document.
64. Further, I do not consider it would be unreasonable to release the names and relationship descriptors of the Applicant's family members. However, having considered certain information provided to me by the Agency, I consider it would be unreasonable to release other personal affairs information regarding the Applicant's siblings and other third parties. Further, although the Applicant may already be aware of this information, I consider it unreasonable to release signatures, mobile phone numbers and addresses of the Applicant's family members.
65. **Annexure 1** sets out details of my decision in relation to section 33(1).

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<sup>12</sup> *O'Sullivan v Department of Health and Community Services (No 2)* [1995] 9 VAR 1 at [14]; *Beauchamp v Department of Education* [2006] VCAT 1653 at [42].



### ***Deletion of exempt or irrelevant information***

66. 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.
67. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'<sup>13</sup> 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.<sup>14</sup>
68. I have considered the effect of deleting exempt information from the document in accordance with section 25. I am satisfied it is practicable to delete the exempt information as to do so would not require substantial time and effort, and the edited document would retain meaning.

### **Conclusion**

69. In relation section 38, I am not satisfied the document is exempt in conjunction with the prohibition on disclosure under section 141(2) of the Health Services Act, as I am satisfied the Applicant meets the requirements for the exception under section 141(3)(a) as the deceased person's 'senior available next of kin'.
70. However, while I am satisfied information in the document is exempt under sections 33(1) and 35(1)(b), I have determined certain personal affairs information is not exempt under section 33(1), as its disclosure would not be unreasonable in the circumstances.
71. Accordingly, I have determined to release additional information to the Applicant.
72. **Annexure 1** sets out my decision in relation to sections 33(1) and 35(1)(b) to the document.
73. To assist the Agency, OVIC has prepared a marked up copy of the document showing my decision in relation to section 35(1)(b) for reference only.

### **Review rights**

74. If either party to this review is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.<sup>15</sup>
75. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.<sup>16</sup>
76. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.<sup>17</sup>
77. Information about how to apply to VCAT is available online at [www.vcat.vic.gov.au](http://www.vcat.vic.gov.au). Alternatively, VCAT may be contacted by email at [admin@vcat.vic.gov.au](mailto:admin@vcat.vic.gov.au) or by telephone on 1300 018 228.
78. 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.<sup>18</sup>

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<sup>13</sup> *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].

<sup>14</sup> *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].

<sup>15</sup> The Applicant in section 50(1)(b) and the Agency in section 50(3D).

<sup>16</sup> Section 52(5).

<sup>17</sup> Section 52(9).

### ***Third party review rights***

79. As I have determined to release the personal affairs information of third parties in the document, which the Agency determined is exempt under section 33(1), if practicable, I am required to notify those persons of their right to seek review by VCAT of my decision within 60 days from the date they are given notice.<sup>19</sup>

80. 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.<sup>20</sup>

81. VCAT also considers the possibility of an unnecessary intrusion into the lives of third parties is relevant when assessing the practicability of notifying a person.<sup>21</sup>

82. In this case, I am satisfied it is not practicable to notify the relevant third parties of their review rights in the circumstances given the nature of the additional information to be released to the Applicant, the familial relationship between the Applicant and the deceased person, my finding in relation to the Applicant being the deceased person's 'senior available next of kin', and the personal affairs information of Agency officers merely reflecting those officers undertaking their usual professional duties in the context of a public workplace rather than disclosing information about their private or personal lives.

### ***When this decision takes effect***

83. My decision does not take effect until the Agency's 14 day review period expires.

84. If a review application is made to VCAT, my decision will be subject to any VCAT determination.

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<sup>18</sup> Sections 50(3F) and (3FA).

<sup>19</sup> Sections 49P(5), 50(3A) and 52(3).

<sup>20</sup> *Re Schubert and Department of Premier and Cabinet* (2001) 19 VAR 35 at [45].

<sup>21</sup> *Coulston v Office of Public Prosecutions Victoria* [2010] VCAT 1234 at [42].

Annexure 1 – Schedule of Documents

Doc. No.	Date	Document	Pages	Agency decision	OVIC decision	Comments
1.	Various	Medical record of deceased person	1785	Released in part  Section 38	<p><b>Release in part</b></p> <p>Sections 33(1), 35(1)(b), 25</p> <p>The following information relating to the Applicant’s family members, Agency officers and other third parties and is exempt under section 33(1):</p> <ul style="list-style-type: none"> <li>• direct telephone numbers;</li> <li>• mobile telephone numbers;</li> <li>• addresses;</li> <li>• signatures; and</li> <li>• email addresses</li> </ul> <p>The following information is exempt under section 35(1)(b):</p> <ul style="list-style-type: none"> <li>• [details redacted]</li> </ul>	<p><b>Section 33(1):</b> For the reasons set out above, I am not satisfied it would be unreasonable to disclose the names, initials and position titles of Agency officers. Accordingly, this information is not exempt under section 33(1).</p> <p>However, I am satisfied it would be unreasonable to release certain personal affairs information of third parties in the document. Accordingly, this information is exempt under section 33(1).</p> <p><b>Section 35(1)(b):</b> For the reasons set out above, I am satisfied certain information communicated to the Agency by third parties is exempt under section 35(1)(b), as its disclosure would be contrary to the public interest in that it would impair the Agency’s ability to receive information of a similar nature in the future.</p> <p><b>Section 25:</b> I am satisfied it is practicable to provide the Applicant with an edited copy of the document with exempt deleted in accordance with section 25.</p>