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Notice of Decision and Reasons for Decision

Applicant:	'CO7'
Agency:	Mercy Hospitals Victoria Ltd
Decision date:	29 January 2021
Exemptions considered:	Sections 33(1), 35(1)(b)
Citation:	'CO7' and <i>Mercy Hospitals Victoria Ltd (Freedom of Information)</i> [2021] VICmr 25 (29 January 2021)

FREEDOM OF INFORMATION – medical records – health 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 is the same as the Agency's decision.

On the information before me, I am satisfied the personal affairs information of third parties in the documents is exempt under section 33(1), and the confidential information provided by third parties is exempt under section 35(1)(b).

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner

29 January 2021

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency seeking access to their complete medical record.
2. The Agency identified ten documents comprising 16 pages falling within the terms of the Applicant's request.
3. The Agency relied on the exemptions in sections 33(1) and 35(1)(b) to refuse access to parts of the documents.

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 documents.
5. I have examined copies of the documents and considered all relevant communications and submissions received from the parties.
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.

Section 33(1)

8. 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'.
9. Information relating to an individual's 'personal affairs' includes, but is not limited to, information that identifies any person, or discloses their address or location. It also includes any information from which such information may be reasonably determined.²
10. A third party's opinion or observations about another person's conduct can constitute information in relation to the personal affairs of a third party.³
11. A document will disclose personal affairs information if the document is capable of, either directly or indirectly, identifying a particular individual whose personal affairs are disclosed. As the nature of disclosure under the FOI Act is unrestricted and unconditional, this is to be interpreted by the capacity of any member of the public to potentially identify a third party.⁴

¹ Sections 33(1) and (2).

² Section 33(9).

³ *Richardson v Business Licensing Authority* [2003] VCAT 1053, cited in *Davis v Victoria Police (General)* [2008] VCAT 1343 at [43], *Pritchard v Victoria Police (General)* [2008] VCAT 913 at [24], *Mrs R v Ballarat Health Services (General)* [2007] VCAT 2397 at [13].

⁴ *Ibid.*

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

12. I am satisfied the documents contain the personal affairs information of individuals other than the Applicant, being the names of Agency officers and the names of third parties who referred the Applicant and provided contextual information to the Agency.

Would disclosure of the personal affairs information in the documents be unreasonable?

13. The concept of 'unreasonable disclosure' involves balancing the public interest in disclosure of official information with the protection of a person's right to privacy in the particular circumstances.
14. The Supreme Court of Victoria Court of Appeal has held there is 'no absolute bar to providing access to documents which relate to the personal affairs of others', and the exemption under 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'.⁵
15. In determining whether disclosure of personal affairs information in the documents would be unreasonable in this matter, I have considered the following factors:

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

Having regard to the content of the personal affairs information and the setting in which it was provided, I consider the information is sensitive, personal and 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) 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 for seeking access to a 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.

⁵ [2008] VSCA 218 at [76].

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

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

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.

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

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.

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.

(g) Whether disclosure of the information would, or would be reasonably 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 weighed up the above factors, on balance, I am satisfied disclosure of the personal affairs information of all third parties named or identified in the documents would be unreasonable in the circumstances.

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

17. 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.

18. 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?

19. Whether information communicated by an individual was communicated in confidence is a question of fact.⁸

20. When determining whether information was communicated in confidence, it is necessary to consider the position from the perspective of the communicator.⁹

⁷ Section 33(2A).

⁸ *Ryder v Booth* [1985] VR 869 at 883; *XYZ v Victoria Police* [2010] VCAT 255 at [264].

⁹ *Ibid*, *XYZ* at [265].

21. Confidentiality can be express or implied from the circumstances of a matter.¹⁰
22. 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.
23. I am satisfied the information exempted by the Agency is information communicated to the Agency by third parties on a voluntarily basis.
24. I have carefully considered the information in the documents 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.
25. Accordingly, I am satisfied information in the documents 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?

26. 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.
27. I acknowledge the information deleted in the documents by the Agency is important to the Applicant and concerns them.
28. 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.
29. 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 to provide timely and effective treatment and care to its patients.
30. 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.
31. 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.
32. 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.
33. In these circumstances, I am satisfied disclosure of the information exempted by the Agency in the documents 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.

¹⁰ Ibid, XYZ at [265].

34. Accordingly, I am satisfied the relevant information redacted by the Agency in Documents 7 and 10 is exempt under section 35(1)(b).

Conclusion

35. On the information before me, I am satisfied the personal affairs information of third parties in the documents is exempt under section 33(1), and the confidential information provided by third parties in documents 7 and 10 is exempt under section 35(1)(b).

Review rights

36. If the Applicant is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.¹¹
37. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹²
38. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹³
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.¹⁴

¹¹ Section 50(1)(b).

¹² Section 52(5).

¹³ Section 52(9).

¹⁴ Sections 50(3F) and (3FA).