

Notice of Decision and Reasons for Decision

Applicant:	'DP8'
Agency:	The Royal Children's Hospital
Decision date:	3 September 2021
Exemptions considered:	Sections 30(1), 35(1)(b)
Citation:	'DP8' and the Royal Children's Hospital (Freedom of Information) [2021] VICmr 270 (3 September 2021)

FREEDOM OF INFORMATION – medical records – clinical note – 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 in that I am satisfied the information is exempt.

However, I have determined that a different exemption applies, and the exempted information is exempt under section 30(1) of the FOI Act.

My reasons for decision follow.

Sven Bluemmel
Information Commissioner

3 September 2021

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency for access to their child's medical record.
2. In its decision, the Agency identified one document, being the medical record, and decided to refuse access to one page of the record in part. The Agency relied on the exemption in section 38 to refuse access. The Agency's decision letter sets out the reasons for its decision.

Review application

3. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access to the one page in part.
4. During the review, the Agency stated that it no longer sought to rely on section 38 to refuse access to the information. Instead, it seeks to rely on the exemption in section 35(1)(b).
5. I have examined the information subject to review.
6. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
7. I have considered all communications received from the parties.
8. 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.
9. 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.

Review of exemptions

Section 35(1)(b) – Documents containing material obtained in confidence

10. 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 a Minister; and
 - (b) disclosure would be contrary to the public interest as it would be reasonably likely to impair the ability of an agency or a Minister to obtain similar information in the future.
11. In essence, the framework of section 35(1) is concerned with protecting the public interest in the free flow of information provided in confidence to an agency.
12. In certain circumstances, this may apply to information communicated to an agency from within, that is by its own officers. However, such matters are generally limited to internal relations of the agency, for

example issues of employment or information reported to a superior officer through an official channel.¹

13. The exempted information is contained in the clinical notes of the medical record. Having reviewed the information and having carefully considered the context in which it was provided, I consider that the information was not matter communicated in confidence to the Agency. Rather, I am of the view where clinical staff exercise their professional obligations by providing their observations, advice or opinions on the clinical management of a patient, this type of information falls more naturally within the scope of section 30(1)(a).
14. Therefore, I am not satisfied section 35(1)(b) applies to the information. Instead, I am of the view section 30(1) is the more appropriate exemption in the circumstances, which is discussed below.

Section 30(1) – Internal working documents

15. 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.
16. The exemption does not apply to purely factual matter in a document.²
17. The term ‘officer of an agency’ is defined in section 5(1). It includes 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.

Does the document disclose matter in the nature of opinion, advice or recommendation prepared by an officer of the Agency, made in the course of, or for the purpose of, the deliberative processes involved in the functions of the Agency?

18. 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’.³
19. The term ‘deliberative process’ has been interpreted widely. In *Re Waterford and Department of Treasury (No. 2)*,⁴ 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.
20. I am satisfied the exempted information conveys the opinion and advice of an Agency officer, which was provided for a deliberative process of the Agency, being the provision and management of healthcare in relation to the Applicant’s child.

¹ *Birnbauer and Davies v Inner and Eastern Health Care Network* [1999] VCAT 1363 at 14.

² Section 30(1).

³ *Halliday v Office of Fair Trading* (unreported, AAT of Vic, Coghlan PM, 20 July 1995).

⁴ [1981] 1 AAR 1.

Would disclosure of the opinion, advice or recommendation be contrary to the public interest?

21. 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.⁵ Importantly, I must consider all relevant facts and circumstances, remaining mindful the object of the FOI Act is to facilitate and promote the disclosure of information.
22. I have given weight to the following relevant factors in the context of this matter:⁶
 - (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 document and the broader context giving rise to the creation of the document;
 - (c) the stage of a decision or a process being undertaken at the time the communications were made;
 - (d) whether disclosure of the document 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 document would give merely a part explanation, rather than a complete explanation for the making 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.
23. Having carefully reviewed the exempted information, I am satisfied it would be contrary to the public interest to release, for the following reasons:
 - (a) Generally speaking, I consider medical information to be highly personal and sensitive in nature. In this matter, the information is sensitive as it relates directly to the medical care of the Applicant's child. The information also relates to broader issues, including the identification of risks and the effective treatment of a patient, which is based on observations made by the officer, at a relevant time.
 - (b) My view is that Agency officers need to be able to freely raise sensitive matters regarding the medical management and health of their 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 any possible concerns.
 - (c) While Agency officers are professionally required to provide their opinions and comments with respect to managing patient treatment and healthcare, I accept there is a public interest in them being able to record their deliberations or consultations for the purposes of informing other Agency officers, without concern sensitive information will be disclosed to patients, or their legal advocates, under the FOI Act. Therefore, I am satisfied the impact of routinely disclosing information of this nature would undermine the robustness of the Agency's processes in providing patient care.

⁵ *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].

⁶ *Hulls v Victorian Casino and Gambling Authority* (1998) 12 VAR 483.

(d) Lastly, I am not satisfied disclosure 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.

24. Accordingly, for the reasons set out above, I am satisfied the information exempted by the Agency is exempt under section 30(1).

Deletion of exempt or irrelevant information

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

26. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'⁷ and the effectiveness of the deletions. Where deletions would render the document meaningless, they are not 'practicable, and release of the document is not required under section 25.⁸

27. I have considered the effect of deleting exempt information from the document. In my view, it was practicable for the Agency to provide an edited copy of the medical record to the Applicant with the exempt information deleted, because the edited record retains meaning.

Conclusion

28. On the information available, I am satisfied the exempted information is exempt under section 30(1).

Review rights

29. 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.⁹

30. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹⁰

31. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹¹

32. 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.

33. 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.¹²

⁷ *Mickelborough v Victoria Police (General)* [2009] VCAT 2786 [31]; *The Herald and Weekly Times Pty Limited v The Office of the Premier (General)* [2012] VCAT 967 at [82].

⁸ *Honeywood v Department of Human Services* [2006] VCAT 2048 [26]; *RFJ v Victoria Police FOI Division (Review and Regulation)* [2013] VCAT 1267 at [140], [155].

⁹ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

¹⁰ Section 52(5).

¹¹ Section 52(9).

¹² Sections 50(3F) and (3FA).