

Notice of Decision and Reasons for Decision

Applicant:	'BV1'
Agency:	The Royal Children's Hospital
Decision date:	16 July 2020
Exemptions considered:	Sections 23, 35(1)(b)
Citation:	'BV1' and the Royal Children's Hospital (Freedom of Information) [2020] VICmr 202 (16 July 2020)

FREEDOM OF INFORMATION – medical records – unreasonable disclosure – information obtained in confidence – copyright

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.

In relation to Documents 1 and 2, I am satisfied these documents are exempt under section 35(1)(b). While I am satisfied it is practicable to provide an edited copy of Document 1 with exempt information deleted in accordance with section 25, I am satisfied Document 2 is exempt in full.

However, my decision on the Applicant's request differs from the Agency's decision in that I have decided to release Document 3 in full as I am not satisfied the exception in section 23(3)(c) applies to this document. Therefore, the Agency is required to release a copy of this document to the Applicant.

My reasons for decision follow.

Joanne Kummrow

Public Access Deputy Commissioner

16 July 2020

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency for access to their [relationship descriptor] medical record.
2. In its decision, the Agency identified certain documents falling within the terms of the Applicant's request. The Agency relied on the exemption in section 35(1)(b) to refuse access to one document in part and one document in full. The Agency also relied on section 23(3)(c) to refuse access to certain documents. The Agency's 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.
4. I have examined copies of the documents subject to review.
5. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
6. I have considered all communications and submissions received from the parties, including:
 - (a) the Agency's decision on the FOI request;
 - (b) information provided with the Applicant's review application;
 - (c) the Agency's submission dated [date]; and
 - (d) communications between OVIC staff, the Agency and Applicant.
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 that the FOI Act 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.

Review of exemptions

Section 35(1)(b)

9. 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.

10. When determining whether information was communicated in confidence, it is to consider the position from the perspective of the communicator.¹ Further, confidentiality can be expressed or implied from the circumstances of the matter.²

Was the information or matter communicated in confidence?

11. Information exempted by the Agency is information that was provided to the Agency by a person or persons in the course of the Agency conducting a psychological assessment of the Applicant's [relationship descriptor].
12. It is clear from the face of the documents there was an understanding the information would remain confidential. The Agency submits the third parties who provided the information expressly requested the information remain confidential.
13. Accordingly, I am satisfied the information was communicated to the Agency in confidence. This view takes into account the sensitivity of the information and the context in which it was provided to the Agency.

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?

14. In determining whether the Agency would be impaired from obtaining similar information in the future if the information is disclosed under the FOI Act, I must be satisfied disclosure of the information would impair the ability of the Agency to obtain similar information in the future. For example, others in the position of the communicator would be reasonably likely to not provide similar information to the Agency.
15. In its written submissions the Agency stated:
 - (a) The disclosure of this information would be contrary to the public interest as it would be reasonably likely to impair its ability to obtain similar information in the future as third parties would be unwilling to provide information in the fear it might be disclosed.
 - (b) It has the potential to undermine the willingness of third parties to participate in the neurological assessment process or healthcare assessments generally, such information being an invaluable contribution to the clinician's understanding and assessment. Further, the importance of protecting information provided by third parties in confidence is acknowledged in the Victorian Health Privacy Principles in Principle 1.7.
16. I accept, in its capacity as a healthcare provider, the Agency relies on confidential information being provided by third parties in order to conduct a full and proper assessment of a patient and provide effective health care. In the case of an assessment of a child and medical treatment provided, the information provided to the Agency is generally sensitive and personal and personal in nature.
17. I consider there is an essential public interest in individuals being able to provide what is often sensitive and confidential information to the Agency. Where this occurs, members of the public need to feel confident the information they provide, including their identities, will be held in confidence by the Agency. Further, I am of the view, if individuals were aware information they provide to a healthcare provider would be disclosed in response to an FOI request, they would be less likely to communicate similar information to the Agency in the future. I consider this to be a significant and detrimental outcome for the Agency, which relies on information of this nature in order to provide appropriate and effective medical treatment and healthcare services to patients.

¹ *XYZ v Victoria Police (General)* [2010] VCAT 255 at [265].

² *Ibid.*

18. I acknowledge the Applicant's personal interest for seeking access to the documents. However, I am of the view the public interest in third parties being able to provide confidential information to a healthcare provider, in particular, in the best interests of a child outweigh the Applicant's personal interest in obtaining the information.
19. For these reasons, I am satisfied the information exempted by the Agency is exempt under section 35(1)(b).

Section 23(3)(c)

20. Section 23(3)(c) provides:

(3) If the form of access requested by the applicant –

...

(c) would involve an infringement of copyright subsisting in a person other than the State, or, in the case of an application to a council, other than the council –

access in the form may be refused and access given in another form.

Does copyright exist in a person other than the Agency?

21. The Agency relied on the exception in section 23(3)(c) of the FOI Act to refuse access to Document 3.
22. The first question to be addressed is whether copyright exists in a person other than the Agency.
23. The documents were written by [author's name] (now deceased) and therefore it is likely copyright subsists with another person or entity, for example, [the author's] publisher.

Would provision of a copy of the document infringe the copyright in the document?

24. It is important to note the form of access requested must involve the infringement of copyright. It is not relevant to the application of section 23(3)(c) that there may be potential for the Applicant, once they receive the document, to subsequently infringe copyright subsisting in the material.
25. Copyright will not be infringed unless the conduct alleged to constitute the infringement occurs without the licence of the owner of the copyright.³ A licence can be implied or express and in this context 'means no more than permission or consent'.⁴ The copyright owner bears the onus of establishing that no such licence exists.
26. On the information before me, it does not appear a contractual relationship exists between the Agency and the copyright owner. Therefore, I am of the view it is unlikely an implied licence exists.
27. An implied licence will arise where an entity is commissioned or engaged (usually for a fee) to produce or create material in which copyright is likely to subsist. In the absence of a contract and express licence to use the material, it will generally be assumed an implied licence is granted to the person who commissioned or engaged the entity to use the material for the purpose for which it was commissioned.
28. Copyright will not be infringed by the State if doing an act that comprises the copyright is done for the services of the State.⁵ In this case, the making of a copy and providing a copy to the Applicant is the act that compromises the copyright. Whilst there are no particular examples where a hospital has

³ Section 36(1) of the *Copyright Act 1968* (Cth).

⁴ *Minogue v Department of Justice* [2004] VCAT 1194.

⁵ Section 183(1) of the *Copyright Act 1968* (Cth).

been considered 'the State' in this context, the Tribunal in noted 'the word 'State should be given a broad interpretation... to advance the purposes of the Act'.⁶

29. Further, copying a document to be given to a member of the public under freedom of information legislation is for the services of the State within the meaning of the *Copyright Act 1986* (Cth) (**Copyright Act**):

Freedom of information legislation is essentially legislation about governance and governance practices. It now forms an important part of our democratic framework, by promoting knowledge about the affairs of government and about governance practices. I am sure that many government agencies would question whether the copying of a document to satisfy a freedom of information request serves the purposes of their agency or of government...But I think it can now be said that freedom of information legislation serves the purpose of good governance. It is in this sense that it also serves the State, which has a legitimate and proper interest in good governance.⁷

30. Therefore, I am satisfied the Agency, in providing a copy of the documents to the Applicant in accordance with the FOI Act, does not fall within the exception in section 23(3)(c) as it does not involve the infringement of copyright in the document. Rather, the issue of infringement may arise if the Applicant subsequently breached copyright in the documents.
31. I remind the Agency of its obligations to inform the owner of the copyright of any copy made of the document, as required by section 183(4) of the Copyright Act.

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'⁸ 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 25.⁹
34. I have considered whether it is practicable to provide the Applicant with an edited copy of the documents with exempt information deleted in accordance with section 25. I am satisfied it is practicable to do so as it would not require substantial time and effort and the edited copy of the documents would retain meaning.

Conclusion

35. On the information before me, I am satisfied Documents 1 and 2 are exempt under section 35(1)(b).
36. While I am satisfied it is practicable to provide an edited copy of Document 1 with exempt information deleted in accordance with section 25, I am satisfied Document 2 is exempt in full.
37. However, as I am not satisfied the exception in section 23(3)(c) applies to Document 3, the Agency is required to release a copy of this document to the Applicant.
38. The Schedule of Documents in **Annexure 1** sets out my decision with respect to each document.

⁶ *Minogue v Department of Justice* [2004] VCAT 1194 at [31].

⁷ *Minogue v Department of Justice* [2004] VCAT 1194 at [47].

⁸ *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].

⁹ *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

- 39. If either party to this review is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.¹⁰
- 40. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹¹
- 41. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹²
- 42. 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.
- 43. 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.¹³
- 44. If a review application is made to VCAT, my decision will be subject to any VCAT determination.

When this decision takes effect

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

¹⁰ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

¹¹ Section 52(5).

¹² Section 52(9).

¹³ Sections 50(3F) and (3FA).

Annexure 1 – Schedule of Documents –

Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
1.	[date]	Psychology Information	2	Released in part Section 35(1)(b)	Release in part Sections 35(1)(b), 25	<p>Section 35(1)(b): I am satisfied the information provided by third parties to Agency officers was communicated in confidence and disclosure of this information would be contrary to the public interest, as it would impair the ability of the Agency to obtain similar information in the future. Accordingly, I am satisfied this information is exempt under section 35(1)(b).</p> <p>Section 25: I am satisfied it is practicable to release an edited copy of the document with exempt information deleted in accordance with section 25, I have determined to grant access to the documents in part.</p>
2.	[date]	Psychology Information	2	Refused in full Section 35(1)(b)	Refused in full Section 35(1)(b)	<p>Section 35(1)(b): See comments for Document 1 above</p> <p>Section 25: I am not satisfied it is practicable to release an edited copy of the document in accordance with section 25, I have determined to refuse access to the document in full.</p>
3.	[date]	Psychology Test Booklet	40	Refused in full Section 23(3)(c)	Release in full Section 23(3)(c)	<p>Section 23(3)(c): I am satisfied that the Agency providing the Applicant a copy of the documents does not fall</p>

Annexure 1 – Schedule of Documents –

Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
						within the exception in section 23(3)(c) of the FOI Act because it does not involve any infringement of copyright.