

Notice of Decision and Reasons for Decision

Applicant:	'DX5'
Agency:	Peninsula Health
Decision date:	17 January 2022
Exemptions considered:	Sections 30(1), 33(1), 35(1)(b)
Citation:	'DX5' and Peninsula Health (Freedom of Information) [2022] VICmr 5 (17 January 2022)

FREEDOM OF INFORMATION – health records – medical records – applicant's records – progress notes – discharge summary – deliberative process – disclosure contrary to the public interest – personal affairs information – unreasonable disclosure of information – information communicated in confidence

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 to some information where the information is exempt under section 30(1) instead of section 35(1)(b).

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
17 January 2021

Reasons for Decision

Background to review

1. The Applicant made a freedom of information request to the Agency seeking access to:

A copy of all records registered under [Applicant's] UR number [UR number] under the Mental Health Act, date of admission, date of release and signatures on the same, Dr. name, medical certificate, any medications also if work care or DVA from [year]. Also records from [date] under UR [UR number] Casualty.
2. In its decision, the Agency identified documents falling within the terms of the Applicant's request and granted access to 92 documents in full and refused access to six documents in part under sections 33(1) and 35(1)(b). 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.
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.
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 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

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. The Agency relies on section 35(1)(b) to refuse access to a record of a telephone or other contact (**Document 3**). The exempted information is contained in the electronic progress notes of the medical record. Having reviewed the information and considered the context in which it was provided, I am satisfied the information was not 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).

11. Therefore, I am not satisfied section 35(1)(b) applies. Instead, I am of the view section 30(1) is the more appropriate exemption in the circumstances, and consider this exemption below.

Section 30(1) – Internal working documents

12. Section 30(1) has three requirements:
- (a) the document must disclose 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, Ministers 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.
13. Section 30(3) provides that purely factual information is not exempt under section 30(1) .

Were the documents prepared by an officer of the Agency?

14. The term ‘officer of an Agency’ is defined in section 5(1). It includes a member of an agency, a member of an agency’s staff, and any person employed by or on behalf of the agency, whether or not the person is subject to the *Public Administration Act 2004* (Vic).¹
15. I am satisfied the documents were prepared by Agency officers.

Does the document disclose matter in the nature of opinion, advice or recommendation, or consultation or deliberation?

16. For section 30(1) to be satisfied, a document must contain matter in the nature of opinion, advice or recommendation prepared by an officer of an agency, or consultation or deliberation between officers.
17. It is not necessary for a document to be in the nature of opinion, advice or recommendation. Rather, it is enough that release of a document would disclose matter of that nature.²
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. I am satisfied the documents contain information in the nature of opinion, advice or recommendation, or consultation or deliberation.

Was the opinion, advice, recommendation, consultation or deliberation disclosed in the document provided in the course of, or for the purposes of, the deliberative process of the agency?

20. 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

¹ See *Koch v Swinburne University* [2004] VCAT 1513 at [15]; *Thwaites v Department of Human Services (No 2)* (1998) 14 VAR 347.

² *Mildenhall v Department of Education* (1998) 14 VAR 87.

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

⁴ [1981] 1 AAR 1.

processes of reflection, for example, upon the wisdom and expediency of a proposal, a particular decision or a course of action.

21. I am satisfied the relevant 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.

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

22. Determining whether disclosure of a document would be contrary to the public interest requires a 'process of the weighing against each other conflicting merits and demerits'.⁵
23. 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. In doing so, I have taken the following factors into consideration:⁶
- (a) the right of every person to seek 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 status of policy development 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 document;
 - (f) the impact of disclosing a document in draft form, including disclosure not clearly or accurately representing a final position or decision reached by the Agency at the conclusion of a decision or process; and
 - (g) 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.
24. Having carefully reviewed the exempted information, I am satisfied disclosure would be contrary to the public interest, 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. 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 Agency officer, at a relevant time.
 - (b) My view is that Agency officers need to be able to freely raise sensitive matters regarding the health and provision of medical treatment to a patient. Should such information be

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.

routinely released under the FOI Act, it is likely Agency officers would feel constrained in the way in which they are able to raise and openly communicate with other medical practitioners and health care staff regarding the management of a patient.

- (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 fully record their deliberations or consultations for the purposes of informing other medical practitioners and health care staff, without concern sensitive information will be disclosed under the FOI Act, including in certain circumstances to the actual patient. Therefore, I am satisfied the impact of routinely disclosing information of this nature would undermine the robustness of the Agency's processes in providing medical treatment and health care to patients.
- (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.

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

26. The Schedule of Documents in **Annexure 1** sets out my decision in relation to section 30(1).

Section 33(1) – Personal affairs information of third parties

27. 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;⁷ and
- (b) such disclosure would be 'unreasonable'.

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

28. Section 33(9) defines information relating to the 'personal affairs' of a person where it is reasonably capable of identifying them, or of disclosing their address or location. Disclosure under the FOI Act is unrestricted and unconditional, consequently, this is to be interpreted by the capacity of any member of the public to identify a third party.⁸

29. 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.⁹

30. I am satisfied the documents contain the personal affairs information of individuals other than the Applicant, namely the names, position titles, opinion and observations of Agency officers and the name, address and other identifying information of third parties.

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

31. The concept of 'unreasonable disclosure' involves balancing the public interest in disclosure of official information with the interest in protecting an individual's right to personal privacy in the circumstances.

⁷ Sections 33(1) and (2).

⁸ *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].

⁹ *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].

32. 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'.¹⁰

33. In determining whether disclosure of a third party's personal affairs information in the document 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

In the context of this matter, the information concerns the provision of medical services to the Applicant. As such, I consider the nature of the personal affairs information is sensitive.

Having carefully reviewed information the Agency exempted under section 33(1), I am satisfied the relevant individuals had a reasonable expectation it would be treated in confidence and not to be disclosed, including under the FOI Act, other than to inform the Agency's provision of medical treatment to the Applicant.

(b) 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 the document.

In this case, I acknowledge the Applicant has a personal interest in getting access to their full medical records, namely they would like to have full information about decisions made by the Agency in relation to the provision of medical treatment to the Applicant.

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

The Applicant seeks the names of Agency officers who were involved in decision making in relation to their medical care. In my view, the ability to obtain such information provides an important mechanism for ensuring the integrity of decision making.

However, should the Applicant have concerns about the conduct of health practitioners in relation to their medical and health care, they may raise these concerns with relevant oversight bodies.

In the circumstances, I am not persuaded there is a broader public interest that would be served by the disclosure of certain personal affairs information in the documents. Rather, as discussed above, I am satisfied disclosure of certain information in the document would be contrary to the public interest as it would impair the ability of the Agency to obtain similar information in the future.

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

I note the Agency determined section 33(1) would apply to the documents during the course of the review and provided copies of consultation with some of the third parties as to their views on the disclosure of their personal affairs information in the documents in accordance with section 33A(2B). The Agency also noted it was not practicable to consult with other third parties.

¹⁰ *Victoria Police v Marke* [2008] VSCA 218 at [76].

On the information before me, I am satisfied the third parties would object to the disclosure of their personal affairs information in the documents.

- (e) Whether disclosure of the information would, or would be reasonably likely to endanger the life or physical safety of any person¹¹

There is no specific information before me to suggest this is a relevant factor in this matter.

34. Having weighed up the above factors, with the exception of Agency officers whose names have already been provided to the Applicant via the documents released in part, I have determined it would be unreasonable to disclose the personal affairs information of third parties in the documents. Accordingly, I am satisfied this information is exempt under section 33(1).
35. My decision in relation to section 33(1) is set out in the Schedule of Documents in **Annexure 1**.

Section 25 – Deletion of exempt or irrelevant information

36. Section 25 requires an agency to grant access to an edited copy of a document where it is practicable to delete exempt or irrelevant information and the applicant agrees to receiving such a copy.
37. Determining what is ‘practicable’ requires consideration of the effort and editing involved in making the deletions ‘from a resources point of view’¹² 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 25.¹³
38. I have considered the effect of deleting exempt information from the documents. 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 documents would retain meaning.

Conclusion

39. On the information before me, I am satisfied certain information in the documents is exempt under sections 30(1) and 33(1).
40. As I am satisfied it is practicable to provide the Applicant with an edited copy of the documents with irrelevant or exempt information deleted in accordance with section 25, access to the documents is granted in part.
41. The Schedule of Documents in **Annexure 1** sets out my decision in relation to each document.

Review rights

42. 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.¹⁴
43. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹⁵

¹¹ Section 33(2A).

¹² *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].

¹³ *Honeywood v Department of Human Services* [2006] VCAT 2048 [26]; *RFJ v Victoria Police FOI Division (Review and Regulation)* [2013] VCAT 1267 at [140] and [155].

¹⁴ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

¹⁵ Section 52(5).

44. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹⁶
45. 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.
46. 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.¹⁷

¹⁶ Section 52(9).

¹⁷ 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]	Screening Register	1	Released in part Section 33(1)	Release in part Section 33(1) The document is to be released in part with the information redacted by the Agency in accordance with section 33(1) to remain deleted.	Section 33(1): The document contains the personal affairs information of a third party. In the circumstances, I am satisfied its disclosure would be unreasonable and is exempt under section 33(1).
2.	[date]	MH [description of] Evaluation	1	Released in part Section 33(1)	Release in part Section 33(1) The document is to be released in part with the information redacted by the Agency in accordance with section 33(1) to remain deleted.	Section 33(1): See comments for Document 1.
3.	[date]	Phone or Other Contact	1	Released in part Section 33(1), 35(1)(b)	Release in part Section 30(1), 33(1) The document is to be released in part with the information redacted by the Agency in	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

Document No.	Date of Document	Document Description	Number Of Pages	Agency's Decision	OVIC Decision	OVIC Comments
					<p>accordance with section 33(1) to remain deleted.</p> <p>The information redacted by the Agency in accordance with section 35(1)(b) is to be redacted under section 30(1) and remain deleted.</p>	<p>health care of the Applicant as well as the Agency's ongoing engagement with, the Applicant.</p> <p>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 for Document 1.</p> <p>Section 35(1)(b): As outlined in the Notice of Decision above, 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).</p> <p>Accordingly, while I am satisfied some information contained in the document is exempt, I am not satisfied all information is exempt under section 35(1)(b).</p>

Document No.	Date of Document	Document Description	Number Of Pages	Agency's Decision	OVIC Decision	OVIC Comments
4.	[date]	MH Nursing Progress Note	1	Released in part Section 33(1)	Release in part Section 33(1) The document is to be released in part with the information redacted by the Agency in accordance with section 33(1) to remain deleted.	Section 33(1): See comments for Document 1.
5.	[date]	MH Nursing Progress Note	1	Released in part Section 33(1)	Release in part Section 33(1) The document is to be released in part with the information redacted by the Agency in accordance with section 33(1) to remain deleted.	Section 33(1): See comments for Document 1.
6.	[date]	Discharge Summary	4	Released in part Section 33(1)	Release in part Section 33(1) The document is to be released in part with the information redacted by the Agency in accordance with section 33(1) to remain deleted.	Section 33(1): See comments for Document 1.