

Notice of Decision and Reasons for Decision

Applicant:	'EA1'
Agency:	Peninsula Health
Decision date:	21 April 2022
Exemptions considered:	Sections 33(1), 35(1)(b)
Citation:	'EA1' and Peninsula Health (Freedom of Information) [2022] VICmr 28 (21 April 2022)

FREEDOM OF INFORMATION – medical records – mental health records – personal affairs information – documents affecting personal privacy of third parties – information communicated in confidence – disclosure unreasonable

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 is the same as the Agency's decision.

I am satisfied certain information in the document is exempt from release under sections 33(1) and 35(1)(b).

As it is practicable to provide the Applicant with an edited copy of the document with exempt information deleted in accordance with section 25, access to the document is granted in part.

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner

21 April 2022

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency seeking access to:
 - ... records held by Peninsula Health, related to myself as a patient in [year]. I specifically request the following document:
 - 2x pages constituting the Screening Register [number], Dated [Date]
 - I request the document be released in full, to validate the accuracy of the record and have it corrected if necessary.
2. The Agency identified one document falling within the terms of the Applicant's request and refused access 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 a copy of the document 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 33(1)– Documents affecting personal privacy of third parties

9. 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'.

¹ Sections 33(1) and 33(2).

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

10. Information relating to a person'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.²
11. 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.³
12. Having reviewed the document, I am satisfied it identifies one or more persons other than the Applicant (**third parties**). Further, the document also contains contextual information related to third parties from which their identities could be ascertained.
13. Accordingly, I am satisfied release of this information would involve disclosure of the personal affairs information of third parties.

Would disclosure of the personal affairs information be unreasonable?

14. The concept of 'unreasonable disclosure' 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 particular circumstances.
15. In *Victoria Police v Marke*,⁴ the Victorian Court of Appeal held there is 'no absolute bar to providing access to documents which relate to the personal affairs of others'. Further, 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 The Court further held, '[t]he protection of privacy, which lies at the heart of [section] 33(1), is an important right that the FOI Act properly protects. However, an individual's privacy can be invaded by a lesser or greater degree'.⁶
16. In determining whether disclosure of the personal affairs information would be unreasonable in these circumstances, I have considered the following factors:

(a) The nature of the personal affairs information

The documents are medical records. Having reviewed the document, I am satisfied it contains the personal affairs information of third parties including their names, mobile telephone numbers, relationship descriptors and other identifying information.

The personal affairs information is sensitive and personal in nature as it relates to the medical care of the Applicant by a third party. The information also relates to broader issues including the identification of risks and the effective treatment of a patient.

I consider the information was provided to the Agency with an expectation of privacy. I have formed this view given its sensitivity in terms of its content and context and consider the relevant third parties would be likely to object to the disclosure of their personal affairs information under the FOI Act.

² Section 33(9).

³ *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].

⁴ [2008] VSCA 218 at [76].

⁵ *Ibid.*

⁶ *Ibid* at [79].

I consider this factor weighs against disclosure given the nature and context of the personal affairs information.

(b) The circumstances in which the Agency obtained the information

The Agency obtains highly sensitive and personal information from patients in its care, as well as from third parties in the context of providing medical treatment and health care services. Ensuring the confidentiality of the information provided by third parties as well as identifying personal details is fundamental to providing medical care.

The personal affairs information exempted by the Agency was obtained by the Agency from third parties in the course of the Agency providing health services to the Applicant. Accordingly, disclosure of this information would disclose the identity of third parties who discussed and provided information to the Agency in confidence. I consider the Agency relies on information of this nature to be provided by third parties voluntarily so it can provide timely and effective treatment and care to patients.

I also am of the view if individuals are unable to 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.

(c) 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 or purpose for seeking access to a document. However, the reasons why an applicant seeks access to a document is a relevant consideration in determining whether disclosure would be unreasonable under section 33(1).

I acknowledge the Applicant's interest in obtaining access to the document in full to validate the accuracy of the Agency's record and, if necessary, to amend any inaccurate information.

(d) Whether any public interest would be promoted by release of the personal affairs information

While I acknowledge the Applicant's personal interest in obtaining access to the documents, in my view, the public interest weighs in favour of preserving the Agency's ability to obtain information from patients and third parties in confidence for the purpose of carrying out its important function of providing medical treatment and health care services to patients. In the event such information were to be routinely released under the FOI Act, I am satisfied the integrity and efficacy of the Agency's primary purpose would be compromised. Accordingly, I consider this broader public interest outweighs the Applicant's personal interest in obtaining access to the documents.

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

In determining whether disclosure of a document would involve the unreasonable disclosure of a third party's personal affairs information, an agency must notify that person an FOI request has been received for documents containing their personal information and seek their view as to whether disclosure of the document should occur.⁷

⁷ Section 33(2B).

However, this obligation does not arise if:

- (a) the notification would be reasonably likely to endanger the life or physical safety of a person, or cause them undue distress, or is otherwise unreasonable in the circumstances;
- (b) the notification would be reasonably likely to increase the risk to the safety of a person experiencing family violence; or
- (c) it is not practicable to do so.⁸

The Agency determined it was not practicable to consult with the relevant third parties to obtain their views regarding disclosure of their personal affairs information. Having considered the information before me and the circumstances in which it was obtained, I am of the view the third parties would be likely to object to the release of the information under the FOI Act.

- (f) Whether disclosure of the information would or would be reasonably likely to endanger the life or physical safety of any person⁹

In determining whether the disclosure of a document would involve the unreasonable disclosure of information relating to the personal affairs of any person, I must consider whether the disclosure of the information would, or would be reasonably likely to, endanger the life or physical safety of any person.¹⁰ I am satisfied this is a relevant factor in this matter.

- 17. Having weighed up the above factors, on balance, I am satisfied disclosure of the personal affairs information of the third parties would be unreasonable in the circumstances, and is exempt from release under section 33(1).

Section 35(1)(b) – Information obtained in confidence by an agency

- 18. The Agency denied access to the document in part under section 35(1)(b).
- 19. 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.

Was the information obtained in confidence by the Agency?

- 20. Whether information communicated by an individual to an agency was communicated in confidence is a question of fact.¹¹
- 21. In doing so, it is necessary to consider the position from the perspective of the communicator, noting confidentiality can be expressed or implied from the circumstances of a matter.¹²
- 22. The Agency determined it was not practicable to consult with the third parties to obtain their views regarding the confidentiality of the information they provided to the Agency. Having considered the information before me and the circumstances in which it was obtained, I am of the view the

⁸ Section 33(2C).

⁹ Section 33(2A).

¹⁰ Section 33(2A).

¹¹ *Ryder v Booth* [1985] VR 869 at [883]; *XYZ v Victoria Police* [2010] VCAT 255 at [264].

¹² *XYZ v Victoria Police* [2010] VCAT 255 at [265].

individuals whose personal affairs information is contained in the documents would be likely to object to its release under the FOI Act.

23. Having carefully considered the relevant submissions, the nature and content of the documents and the context in which the information was provided to the Agency, I am satisfied any third parties would have reasonably intended, at the time, that the information they voluntarily provided to the Agency was done so with an expectation of confidentiality.

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

24. Section 35(1)(b) also requires I consider whether the Agency would be impaired from obtaining similar information in the future if the information were to be disclosed under the FOI Act. This involves considering whether others in the position of the communicator would be reasonably likely to be inhibited or deterred from providing similar information to the Agency in the future should the information be disclosed.
25. The public interest test in section 35(1)(b) is narrow, in that it is directed toward the impact release would have on an agency's ability to obtain the same type of information in the future. I note the exemption will not be made out of an agency's impairment goes no further than showing potential communicators of the information may be less candid than they would otherwise have been.¹³
26. Where information recorded in a patient's medical record regarding medical treatment and healthcare provided by a healthcare service, particularly in relation to a mental health service will, by its very nature, be personal and sensitive information.
27. The voluntary provision of personal and sensitive information by a third party to a healthcare service in a clinical context and in relation to a patient is often critical for an agency to be able to effectively provide treatment to the patient and to efficiently discharge its medical and healthcare responsibilities and functions.
28. I acknowledge the Applicant has a genuine interest in obtaining full access to their medical records. I also acknowledge redactions made to documents concerning an applicant's healthcare and other personal matters, can create a sense of frustration for an applicant, regardless of whether a small amount of material is withheld only, as the applicant may simply wish for a complete copy of their medical and health records.
29. However, if individuals who provide information to the Agency regarding a patient's health were aware their identity and the information they provided would be routinely disclosed in response to an FOI request, they would be less likely to communicate similar information to the Agency in the future. This would be detrimental for the Agency, where it relies on receiving such information to assist or inform its timely and effective provision of medical treatment and health services. Accordingly the withholding of such information would also have a detrimental impact on the medical outcomes and wellbeing of patients.
30. In balancing the competing interests in the Applicant's right to obtain access to their health records with the need for the Agency to receive information provided by a third party in confidence that may inform the Agency's provision of medical treatment to the Applicant, I am satisfied greater weight must be given to ensuring the confidence with which such information is provided to the Agency is preserved in the interests of ensuring patient health and wellbeing. Accordingly, in relation to this information, I am satisfied disclosure of certain information in the documents would be contrary to the public interest as it would impair the ability of the Agency to obtain similar information in the future.

¹³ *Smeaton v Victorian WorkCover Authority* [2012] VCAT 1549 at [69], approving *Birnbauer v Inner and Eastern Health Care Network* [1999] 16 VAR 9.

31. Having weighed up the above factors, and considered the consultation on balance, I am satisfied disclosure of information provided to the Agency in confidence in the documents would be unreasonable. This information is therefore exempt under section 35(1)(b).

Section 25 – Deletion of exempt or irrelevant information

32. 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.
33. Determining what is ‘practicable’ requires consideration of the effort and editing involved in making the deletions ‘from a resources point of view’¹⁴ 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 25.¹⁵
34. Given my decision is the same as the Agency’s decision and it granted access to the document in part in accordance with section 25, I consider it remains practicable to provide the Applicant with an edited copy of the document with exempt information deleted.

Conclusion

35. On the information before me, I am satisfied the document is exempt from release under sections 33(1) and 35(1)(b).
36. As it is practicable to provide the Applicant with an edited copy of the document with exempt information deleted in accordance with section 25, access to the document is granted in part.

Review rights

37. 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.¹⁶
38. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹⁷
39. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹⁸
40. 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.
41. 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.¹⁹

¹⁴ *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].

¹⁵ *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].

¹⁶ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

¹⁷ Section 52(5).

¹⁸ Section 52(9).

¹⁹ Sections 50(3F) and 50(3FA).