

Notice of Decision and Reasons for Decision

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| Applicant: | 'E18' |
| Agency: | Melbourne Health |
| Decision date: | 16 May 2022 |
| Exemption considered: | Section 30(1) |
| Citation: | 'E18' and Melbourne Health (Freedom of Information) [2022] VICmr 108 (16 May 2022) |

FREEDOM OF INFORMATION – medical documents – health information – internal working document – incident reports – [Riskman reports]

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.

While I am satisfied certain information in the documents is exempt from release under section 30(1), my decision on the Applicant's request differs from the Agency's decision in that I have determined to release additional information in the documents where I am satisfied it is not exempt from release under section 30(1).

As I am satisfied it is practicable to provide the Applicant with an edited copy of the documents with irrelevant and exempt information deleted in accordance with section 25, access to the documents is granted in part.

The Schedule of Documents in **Annexure 1** sets out my decision in relation to each document.

A marked-up copy of the documents with information I am satisfied is exempt and irrelevant has also been provided to the Agency.

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner

16 May 2022

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency seeking access to the following documents:

A complete copy of my [family] medical record including the totality of all notes. Please also include incident reports, internal reviews quality and safety documents if applicable.
2. The Agency identified various documents falling within the terms of the Applicant's request and granted access to the Applicant's medical records in full and refused access in part to seven incident reports under sections 30(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. The Applicant indicated they do not seek access to the names, position titles, telephone numbers, email addresses and other personal affairs information of Agency staff. Accordingly, this information is irrelevant information for the purposes of section 25, which is discussed below.
5. Following consultation with OVIC staff, the Agency agreed to release further information in each document. Accordingly, this information is to be released to the Applicant and my review will focus on the remainder of the information the Agency determined is exempt under sections 30(1) and 35(1)(b).
6. I have examined a copy of the documents subject to review.
7. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
8. I have considered all communications and submissions received from the parties.
9. 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.
10. 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 30(1) – Internal working documents

11. 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.

12. The exemption does not apply to purely factual information in a document.¹
13. The term 'officer of an Agency' is defined in section 5(1). It includes a member of an agency, an employee of an agency and any person engaged by or on behalf of an agency, whether or not the person is subject to the *Public Administration Act 2004* (Vic).²

Do the documents disclose matter in the nature of opinion, advice or recommendation prepared by an officer or in consultation or deliberation that has taken place between officers?

14. It is not necessary for a document to be in the nature of opinion, advice or recommendation. Rather, it is enough that release of the document would disclose matter of that nature.³
15. Having considered the content and context of the documents, I am satisfied they contain information in the nature of opinion, advice and recommendations prepared by Agency officers for the purposes of section 30(1).

Was the information communicated in the course of the Agency's deliberative processes?

16. The term 'deliberative process' is interpreted widely and includes any of the processes of deliberation or consideration involved in the functions of an agency, Minister or government.⁴
17. In *Re Waterford and Department of Treasury (No.2)*,⁵ former Victorian 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

18. I am satisfied the information was provided in the course of the Agency's deliberative processes in relation to its review of clinical incidents to identify risks and areas for improvement.

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

19. In determining whether disclosure of a document would be contrary to the public interest, 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 given weight to the following 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 documents and the broader context giving rise to the creation of the documents;
 - (c) the stage of a decision or status of policy development or a process being undertaken at the time the communications were made;

¹ Section 30(3).

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

³ *Mildenhall v Department of Education* (1998) 14 VAR 87.

⁴ *Brog v Department of Premier and Cabinet* (1989) 3 VAR 201 at 208.

⁵ [1984] AATA 67; (1984) 5 ALD 588; 1 AAR 1 at [58].

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

- (d) whether disclosure of the documents 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 documents would give merely a part explanation, rather than a complete explanation for the taking 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;
- (f) the impact of disclosing documents 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.

20. In their decision letter, the Agency advised:

The incident reports have also not been provided on the basis of s 30 of the Act - release of opinion or advice in the course of or for internal deliberations where the release would not be in the public interest as it would impede the way the hospital obtains frank impartial and fearless advice in the future. As stated above, incident Reports relating to the care of patients in the hospital require complete confidentiality to ensure proper candour - they are exempt.

21. Having reviewed the documents, I am satisfied the disclosure of certain information in the documents would be contrary to the public interest for the following reasons:

- (a) The information is sensitive as it relates to the investigation of clinical incidents which occurred during a patient's medical treatment.
- (b) I acknowledge the Applicant's personal interest in the documents, where they seek to obtain as much information as possible regarding their [family member's] time as a patient of the hospital.
- (c) Further, I accept there is a public interest in those who are directly impacted by clinical incidents being properly informed of those events. Public knowledge of these events allows for informed decision making regarding personal health care and ensures accountability and transparency in the public health care system.
- (d) However, this public interest must be balanced against the potential for the investigative process into clinical incidents to be undermined by the release of findings through FOI. Given that investigations and the findings from them promote continuous improvement in practices, policies and procedures within the public health system, I accept it is essential such processes are as thorough and detailed as possible.
- (e) It is essential for the public to have confidence, that when a serious incident occurs in a public hospital, it will be thoroughly investigated, and appropriate measures identified put in place to mitigate the risk of a similar event occurring. In my view, this is an essential public interest of the kind envisaged by Parliament and enshrined in the object of the FOI Act when discussing the need for exemptions.⁷

22. Accordingly, I am satisfied certain information in the documents is exempt from release under section 30(1).

⁷ Section 3.

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

Section 35(1)(b) – Information provided in confidence that would be contrary to the public interest to disclose

24. Where I have already determined information is exempt from release under section 30(1), I have not considered the application of section 35(1)(b).

Section 25 – 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 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’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

27. I have considered the effect of deleting irrelevant and exempt information from the documents. I am satisfied it is practicable to do so as it would not require substantial time and effort, and the edited documents would retain meaning.

Conclusion

28. While I am satisfied certain information in the documents is exempt from release under section 30(1), my decision on the Applicant’s request differs from the Agency’s decision in that I have determined to release additional information in the documents where I am satisfied it is not exempt from release under section 30(1).

29. As I am satisfied it is practicable to provide the Applicant with an edited copy of the documents with irrelevant and exempt information deleted in accordance with section 25, access to the documents is granted in part.

30. The Schedule of Documents in **Annexure 1** sets out my decision in relation to each document.

31. A marked-up copy of the documents with information I am satisfied is exempt and irrelevant has also been provided to the Agency.

Review rights

32. 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.¹⁰

33. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹¹

34. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹²

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].

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

¹¹ Section 52(5).

¹² Section 52(9).

35. 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.
36. 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

When this decision takes effect

37. My decision does not take effect until the Agency's 14 day review period expires.
38. If a review application is made to VCAT, my decision will be subject to any VCAT determination.

¹³ Sections 50(3F) and 50(3FA).

Annexure 1 – Schedule of Documents

| Document No. | Date of Document | Document Description | No. of pages | Agency Decision | OVIC Decision | OVIC Comments |
|--------------|------------------|----------------------|--------------|---|--|---|
| 1. | [date] | Riskman report | 2 | <p>Refused in full</p> <p>Sections 30(1), 35(1)(b)</p> | <p>Release in part</p> <p>Sections 25</p> <p>The document is to be released with irrelevant personal affairs information deleted in accordance with section 25.</p> | <p>Sections 30(1), 35(1)(b): By email dated [date], the Agency agreed to release further information in the document, which it previously determined was exempt under sections 30(1) and 35(1)(b).</p> <p>Accordingly, I am satisfied this information is not exempt.</p> <p>Section 25: The Applicant does not seek access to the personal affairs information of Agency officers. Accordingly, I am satisfied this information is irrelevant.</p> <p>I am also satisfied it is practicable to provide the Applicant with an edited copy of this document with irrelevant information deleted in accordance with section 25.</p> |
| 2. | [date] | Riskman report | 3 | <p>Refused in full</p> <p>Sections 30(1), 35(1)(b)</p> | <p>Release in part</p> <p>Sections 30(1), 25</p> <p>The document is to be released with exempt and irrelevant information deleted in accordance with</p> | <p>Section 30(1): By email dated [date], the Agency agreed to release further information in the document, which it previously determined was exempt under section 30(1).</p> <p>I am satisfied certain information in the document is exempt under section 30(1)</p> |

| Document No. | Date of Document | Document Description | No. of pages | Agency Decision | OVIC Decision | OVIC Comments |
|--------------|------------------|----------------------|--------------|---|--|--|
| | | | | | <p>section 25, as recorded in the marked-up version of the document provided to the Agency with this decision.</p> | <p>for the reasons outlined in the Notice of Decision above.</p> <p>Section 35(1)(b): By email dated [date], the Agency agreed to release further information in the document, which it previously determined was exempt under section 35(1)(b).</p> <p>Where I have already determined information to be exempt under section 30(1), I have not considered the application of section 35(1)(b).</p> <p>Section 25: I am satisfied it is practicable to provide the Applicant with an edited copy of this document with exempt and irrelevant information deleted in accordance with section 25.</p> |
| 3. | [date] | Riskman report | 2 | <p>Refused in full</p> <p>Sections 30(1), 35(1)(b)</p> | <p>Release in part</p> <p>Sections 25</p> <p>The document is to be released with irrelevant personal affairs information deleted in accordance with section 25.</p> | <p>Sections 30(1), 35(1)(b): See comments for Document 1.</p> <p>Section 25: See comments for Document 1.</p> |

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|--------------|------------------|----------------------|--------------|--|--|--|
| 4. | [date] | Riskman report | 2 | Refused in full Sections 30(1), 35(1)(b) | Release in part Sections 25 The document is to be released with irrelevant personal affairs information deleted in accordance with section 25. | Sections 30(1), 35(1)(b): See comments for Document 1. Section 25: See comments for Document 1. |
| 5. | [date] | Riskman report | 2 | Refused in full Sections 30(1), 35(1)(b) | Release in part Sections 30(1), 25 The document is to be released with exempt and irrelevant information deleted in accordance with section 25, as recorded in the marked-up version of the document provided to the Agency with this decision. | Section 30(1): See comments for Document 2. Section 35(1)(b): See comments for Document 2. Section 25: See comments for Document 2. |
| 6. | [date] | Riskman report | 2 | Refused in full Sections 30(1), 35(1)(b) | Release in part Sections 25 | Sections 30(1), 35(1)(b): See comments for Document 1. |

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| | | | | | The document is to be released with irrelevant personal affairs information deleted in accordance with section 25. | Section 25: See comments for Document 1. |
| 7. | [date] | Riskman report | 2 | Refused in full Sections 30(1), 35(1)(b) | Release in part Sections 25 The document is to be released with irrelevant personal affairs information deleted in accordance with section 25. | Sections 30(1), 35(1)(b): See comments for Document 1. Section 25: See comments for Document 1. |