

Notice of Decision and Reasons for Decision

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| Applicant: | 'EK7' |
| Agency: | St Vincent's Health |
| Decision date: | 11 May 2022 |
| Exemptions considered: | Sections 33(1), 35(1)(b), 25 |
| Citation: | 'EK7' and St Vincent's Health (<i>Freedom of Information</i>) [2022] VICmr 125 (11 May 2022) |

FREEDOM OF INFORMATION – health records – medical information – mental health assessment – information provided in confidence – personal affairs information

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 differs from the Agency's decision.

I am satisfied certain information is exempt under section 35(1)(b). However, I am not satisfied other information is exempt under sections 33(1) or 35(1)(b).

Where I am satisfied it is practicable to provide the Applicant with an edited copy of a document with exempt or irrelevant information deleted in accordance with section 25, access is granted in part or in full. Where I have determined it is not practicable to do so, access is refused in full.

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
11 May 2022

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency seeking access to their medical records.
2. The Agency identified documents falling within the terms of the Applicant's request and refused access to certain documents in part and in full under section 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 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.
9. In conducting a review under section 49F, section 49P requires that I make a new or 'fresh decision'. Therefore, my review does not involve determining whether the Agency's decision is correct, but rather requires my fresh decision to be the 'correct or preferable decision'.¹ This involves ensuring my decision is correctly made under the FOI Act and any other applicable law in force at the time of my decision.

Review of exemptions

Section 35(1)(b) – information communicated 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 Minister; and
 - (b) disclosure would be contrary to the public interest as it would reasonably likely impair the ability of an agency or a Minister to obtain similar information in the future.

¹ *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577 at 591.

Would disclosure of the documents divulge information or matter communicated in confidence by or on behalf of a person or a government to the Agency?

11. Whether information was communicated in confidence to an agency is a question of fact.²
12. When determining whether information was communicated in confidence, it is necessary to consider the position from the perspective of the communicator.³
13. Confidentiality can be expressed or implied from the circumstances of a matter.⁴
14. The pages subject to review form part of the Applicant's medical record. They constitute notes written by healthcare professionals that relate to the Applicant and third parties who provided information to the hospital in relation to the Applicant in the context of their health.
15. The Agency determined it was not practicable to consult with any third party regarding their view on disclosure of the confidential information in the documents due to the age of the documents.⁵
16. I have carefully considered the confidential information in the documents and the context in which it was provided to the Agency. I consider it is reasonably likely the third parties who communicated the information to the Agency did so with an expectation it would remain confidential.
17. Accordingly, I am satisfied information in the documents was communicated to the Agency in confidence by third parties.

Would disclosure of the documents 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?

18. In determining whether disclosure of the documents would be contrary to the public interest, I must consider whether to do so would be reasonably likely to impair the Agency's ability to obtain similar information in the future.
19. In the context of the Agency, being a public hospital, the voluntary provision of sensitive information by third parties is often vital to its ability to effectively discharge its healthcare functions in relation to the provision of medical treatment and patient care. By its nature, such information is generally personal and confidential. I consider the Agency relies on such information to be provided voluntarily by third parties to assist it in providing timely and effective medical treatment to a patient in its care.
20. I consider there is an essential public interest in individuals being able to provide what is often sensitive and confidential information about a patient to medical staff in a public health service agency.
21. If third parties, who provide confidential information to the Agency in relation to a patient, were aware information of this nature was routinely disclosed under the FOI Act, I accept they would be reasonably likely to be reluctant to communicate similar information to the Agency in the future.
22. I am of the view, if a third party is unable to speak freely and provide information to medical and other hospital staff in connection with a patient in their care, the timeliness and effectiveness of

² *Ryder v Booth* [1985] VR 869 at 883; *XYZ v Victoria Police* [2010] VCAT 255 at [264].

³ *Ibid*; *XYZ* at [265].

⁴ *Ibid*.

⁵ Section 35(1A) requires an agency to consult with a third party in relation to confidential information they provided to the agency and to seek their views on its disclosure. However, this obligation does not apply in certain circumstances, including if the agency determines consultation is not practicable.

medical care provided to patients may suffer. I consider this would be a further significant and detrimental outcome for patients, the Agency and similar health providers.

23. Accordingly, I am satisfied the disclosure of certain confidential information in the documents would 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 and is exempt under section 35(1)(b).
24. However, I note certain information was provided to the Agency by its officers and other medical professionals who were involved in the Applicant's medical care. While I acknowledge the information was communicated in confidence, I am not satisfied other persons in the position of the communicators of the information would be less likely to provide similar information to the Agency in the future should these documents be released in response to the Applicant's FOI request.
25. I consider such information must be provided to the Agency by its officers and other medical professionals in accordance with their professional duties and responsibilities. Further, I am of the view that medical professionals are obliged to provide their clinical opinions and communicate with other health providers to assist with the timely and effective treatment of a patient. Given this, I am not satisfied disclosure of certain information would be reasonably likely to impair the ability of the Agency to obtain similar information in the future.
26. Accordingly, while I am satisfied certain information is exempt under section 35(1)(b), I am not satisfied other information in the documents is exempt under section 35(1)(b).
27. My decision in relation to section 35(1)(b) is set out in the Schedule of Documents in **Annexure 1**.

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

28. As I have determined certain information exempted from release by the Agency under section 35(1)(b) is not exempt, I have considered the application of section 33(1) to this information, as I am satisfied it includes the personal affairs information of individuals other than the Applicant.
29. 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 (a **third party**);⁶ and
 - (b) such disclosure would be 'unreasonable'.

Do the documents contain the 'personal affairs information' of a third party?

30. Information relating to the 'personal affairs' of a person 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.⁷
31. The documents contain the names, position titles and contact details of Agency staff and third parties.
32. Accordingly, I am satisfied the documents contain the 'personal affairs information' of third parties for the purposes of section 33.

⁶ Sections 33(1) and (2).

⁷ Section 33(9).

Would disclosure of the personal affairs information be unreasonable?

33. Whether or not an agency officer's personal affairs information is exempt under section 33(1) must be considered in the context of the particular circumstances of each matter.⁸
34. Determining whether disclosure of a document would be unreasonable involves balancing the public interest in the disclosure of official information held by a government agency with the interest in protecting an individual's personal privacy in the circumstances.⁹
35. The FOI Act does not place any restrictions on an applicant's use or dissemination of documents obtained under FOI.¹⁰
36. The proper application of section 33(1) involves consideration of 'all matters relevant, logical and probative to the existence of conditions upon which the section is made to depend'.¹¹
37. In determining whether disclosure of the personal affairs information would be unreasonable in the circumstances of this matter, I have given consideration to the following factors:¹²
 - (a) the nature of the personal affairs information;
 - (b) the circumstances in which information was obtained by the Agency;
 - (c) the Applicant's interest in the information;
 - (d) whether any public interest would be promoted by the release of the information;
 - (e) whether any individuals to whom the information relates object, or would be likely to object to the release of the information;
 - (f) the likelihood disclosure would cause distress or anxiety to the individuals to whom relates to; and
 - (g) whether disclosure of the information or would be reasonably likely to endanger the life or physical safety of any person.¹³
38. The personal affairs information is the names, contact details and position titles of Agency officers and third parties who were involved in the provision of medical treatment to the Applicant. The documents also contain the names and contact information of the [description of third parties].
39. The names, position titles and contact details of the medical professionals and Agency officers were acquired by the Agency during their usual work duties and responsibilities in providing medical treatment to the Applicant. As such, I consider the personal affairs information concerns these individuals in their professional roles, rather than in a personal or private capacity.
40. Where the names and contact details of third parties have been released in other documents and these individuals have corresponded with the Applicant previously, I am satisfied this information is not particularly sensitive and would not be unreasonable to release.

⁸ *Coulson v Department of Premier and Cabinet (Review and Regulation)* [2018] VCAT 229.

⁹ *Re Page v Metropolitan Transit Authority* (1988) 2 VAR 243 at 245-6.

¹⁰ *Victoria Police v Marke* [2008] VSCA 218 at [68].

¹¹ [2008] VSCA 218 at [104].

¹² *Ibid.*

¹³ Section 33(2A)

41. I am also satisfied it would not be unreasonable to release the names and position titles of medical professionals and an Agency officer, where this information was acquired as part of their professional roles.
42. Accordingly, I am not satisfied certain personal affairs information is exempt from release under section 33(1).
43. 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

44. 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.
45. 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
46. 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.
47. Where I am satisfied editing a document would not require substantial time and effort, and it would retain meaning, access to the document is granted in part or in full. Where it is not practicable to do so, as the remaining document would not retain any meaning, access is refused in full.
48. My decision in relation to section 25 is set out in the Schedule of Documents in **Annexure 1**.

Conclusion

49. On the information before me, I am satisfied certain information in the documents is exempt under section 35(1)(b). However, I am not satisfied other information is exempt under sections 33(1) or 35(1)(b).
50. Where I am satisfied it is practicable to provide the Applicant with an edited copy of a document with exempt or irrelevant information deleted in accordance with section 25, access is granted in part or in full. Where I have determined it is not practicable to do so, access is refused in full.
51. The Schedule of Documents in **Annexure 1** sets out my decision in relation to each document.

Review rights

52. 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
53. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹⁷

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).

54. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹⁸
55. 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.
56. 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

Third party review rights

57. As I have determined to release documents that contain the personal affairs information of persons other than the Applicant if practicable, I am required to notify those persons of their right to seek review by VCAT of my decision within 60 days from the date they are given notice.²⁰
58. In the circumstances, I have decided notifying the relevant parties of their review rights is not practicable as I am of the view the notifying the relevant third parties would be an unnecessary intrusion for the following reasons:
 - (a) the nature of the information to be disclosed;
 - (b) the majority of the information has been released to the Applicant previously; and
 - (c) the passage of time since the documents were created.

When this decision takes effect

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

¹⁸ Section 52(9).

¹⁹ Sections 50(3F) and 50 (3FA).

²⁰ Sections 49P(5), 50(3), 50(3AB) and 52(3).

Annexure 1 – Schedule of Documents

| Document No. | Date of Document | Document Description | No. of pages | Agency Decision | OVIC Decision | OVIC Comments |
|--------------|------------------|---------------------------|--------------|--------------------------------------|--|--|
| 1. | [date] | Telephone contact | 1 | Refused in full Section 35(1)(b) | Refuse in full Section 35(1)(b) | <p>Section 35(1)(b): I am satisfied this document is exempt from release under section 35(1)(b) for the reasons outlined in the Notice of Decision above.</p> <p>Section 25: I am not satisfied it is practicable to provide the Applicant with an edited copy of this document with exempt information deleted in accordance with section 25.</p> |
| 2. | [date] | Telephone contact | 2 | Released in part Section 35(1)(b) | <p>Release in part Section 35(1)(b)</p> <p>The document is to be released with the information exempt from release by the Agency under section 35(1)(b) deleted in accordance with section 25.</p> | <p>Section 35(1)(b): See comments for Document 1.</p> <p>Section 25: I am satisfied it is practicable to provide the Applicant with an edited copy of this document with exempt information deleted in accordance with section 25.</p> |
| 3. | [date] | Screening Register detail | 2 | Released in part Section 35(1)(b) | Release in full | <p>Section 35(1)(b): For the reasons outlined in the Notice of Decision above, I am not satisfied this document is exempt from release under section 35(1)(b).</p> |

| Document No. | Date of Document | Document Description | No. of pages | Agency Decision | OVIC Decision | OVIC Comments |
|--------------|------------------|----------------------|--------------|---|---|---|
| | | | | | | Section 33(1): For the reasons outlined in the Notice of Decision above, I am not satisfied it would be unreasonable to release the personal affairs information in this document. |
| 4. | [date] | CMHPN Case Manager | 1 | Refused in full Section 35(1)(b) | Refuse in full Section 35(1)(b) | Section 35(1)(b): See comments for Document 1. Section 25: See comments for Document 1. |
| 5. | [date] | CMHPN Case Manager | 1 | Refused in full Section 35(1)(b) | Refuse in full Section 35(1)(b) | Section 35(1)(b): See comments for Document 1. Section 25: See comments for Document 1. |
| 6. | [date] | CMHPN Case Manager | 1 | Refused in full Section 35(1)(b) | Refuse in full Section 35(1)(b) | Section 35(1)(b): See comments for Document 1. Section 25: See comments for Document 1. |
| 7. | [date] | CMHPN CATS | 1 | Released in part Section 35(1)(b) | Release in full | Section 35(1)(b): See comments for Document 3. |

| Document No. | Date of Document | Document Description | No. of pages | Agency Decision | OVIC Decision | OVIC Comments |
|--------------|------------------|----------------------|--------------|--------------------------------------|------------------------------------|---|
| | | | | | | Section 33(1): See comments for Document 3. |
| 8. | [date] | CMHPN Doctor | 1 | Released in part Section 35(1)(b) | Release in full | Section 35(1)(b): See comments for Document 3. Section 33(1): See comments for Document 3. |
| 9. | [date] | MH Telephone Contact | 1 | Refused in full Section 35(1)(b) | Refuse in full Section 35(1)(b) | Section 35(1)(b): See comments for Document 1. Section 25: See comments for Document 1. |
| 10. | [date] | MH Telephone Contact | 1 | Refused in full Section 35(1)(b) | Refuse in full Section 35(1)(b) | Section 35(1)(b): See comments for Document 1. Section 25: See comments for Document 1. |
| 11. | [date] | MH Telephone Contact | 1 | Refused in full Section 35(1)(b) | Release in full | Section 35(1)(b): See comments for Document 3. Section 33(1): See comments for Document 3. |

| Document No. | Date of Document | Document Description | No. of pages | Agency Decision | OVIC Decision | OVIC Comments |
|--------------|------------------|----------------------|--------------|--------------------------------------|-----------------|---|
| 12. | [date] | Discharge Summary | 2 | Released in part Section 35(1)(b) | Release in full | Section 35(1)(b): See comments for Document 3. Section 33(1): See comments for Document 3. |
| 13 | [date] | MH eAssessment | 1 | Released in part Section 35(1)(b) | Release in full | Section 35(1)(b): See comments for Document 3. Section 33(1): See comments for Document 3. |