

Notice of Decision and Reasons for Decision

Applicant:	'ES3'
Agency:	Barwon Health
Decision date:	8 August 2022
Exemptions considered:	Sections 33(1), 35(1)(b)
Citation:	'ES3' and Barwon Health (Freedom of Information) [2022] VICmr 194 (8 August 2022)

FREEDOM OF INFORMATION – medical records – health records – deceased parent – next of kin – personal affairs information of third parties

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 a document requested by the Applicant under the FOI Act.

My decision on the Applicant's request differs from the Agency's decision in that I have determined to release additional information in the document where I am satisfied it is not exempt information.

While I am satisfied certain information is exempt from release under section 33(1), I am not satisfied other information is exempt from release under sections 33(1) and 35(1)(b).

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

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner

8 August 2022

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency for access to their deceased parent's medical record (**deceased person**).
2. The Agency wrote to the Applicant, in accordance with 25A(6), advising that it intended to refuse to process their request on grounds it was satisfied the work involved in processing the request would divert its resources substantially and unreasonably from its other operations. The Agency invited the Applicant to consult with a view to narrowing the scope of their request.
3. On the same day, the Applicant agreed to narrow the scope of their request to discharge summaries and operations records for a specified period and a copy of all documents in relation to the deceased person's last three admissions.
4. The Agency processed the Applicant's request in accordance with the revised terms.
5. The Agency identified two documents falling within the terms of the Applicant's request and granted access to one document in full and refused access to one document in full under sections 33(1) and 35(1)(b). The Agency's decision letter sets out the reasons for its decision.

Review application

6. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
7. I have examined a copy of the document subject to review.
8. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
9. I have considered all communications and submissions received from the parties.
10. 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.
11. 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

12. 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**);¹ and
 - (b) such disclosure would be 'unreasonable'.

¹ Sections 33(1) and 33(2).

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

13. 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 this may be reasonably determined.²
14. 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
15. The document subject to review is part of the deceased person's medical record. It contains the names of third parties (medical professionals and Agency officers) as well as notes relating to the care of the deceased person and their medical and personal history.

Would disclosure of the personal affairs information be unreasonable?

16. 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.
17. 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
18. Section 33(2B) requires that, in deciding whether disclosure under the FOI Act would involve the unreasonable disclosure of information relating to the personal affairs of any person (including a deceased person), the Agency must:
 - (a) notify the person who is the subject of that information (or if that person is deceased, that person's next of kin) that the agency has received a request for access to the document;
 - (b) seek that person's view as to whether disclosure of the document should occur; and
 - (c) state that if the person consents to disclosure of the document, or disclosure subject to deletion of information relating to the personal affairs of the person, the person is not entitled to apply to the tribunal for review of a decision to grant access to that document.
19. The term 'next of kin' is not defined in the FOI Act. Section 3 of the *Human Tissues Act 1982* (Vic) provides the following definition:

"senior available next of kin" means –

...

(b) in relation to any other deceased person –

- (i) where the person, immediately before the person's death, had a spouse or domestic partner and that spouse or domestic partner is available – the spouse or domestic partner;

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].

- (ii) where the person, immediately before the person's death, did not have a spouse or domestic partner or the spouse or domestic partner is not available – a son or daughter of the person who has attained the age of 18 years and who is available;
- (iii) where no person referred to in subparagraph (i) or (ii) is available but a parent of the person is available that parent; or
- (iv) where no person referred to in subparagraph (i), (ii), or (iii) is available – a brother or sister of the person who has attained the age of eighteen years and is available.

20. In this instance, I accept the Applicant is the deceased person's next of kin.

21. In determining whether disclosure of the deceased person's personal affairs information would be unreasonable in the circumstances, I have considered the following factors:

(a) The nature of the personal affairs information

The information was obtained by the Agency in the course of providing patient health services and medical treatment to the Applicant's parent and comprises detailed clinical observations including heart rates and fluid balances, orders made by nurses, registrars and other treating practitioners, changes in clinical state and interventions undertaken by Agency officers in the course of its treatment of the individual.

The personal affairs information also comprises the names, signatures, contact details and position titles of Agency officers and third parties who were involved in the provision of medical treatment to the individual. The document also contains the Applicant's name and contact information.

(b) The circumstances in which the information was obtained

The information was collected by the Agency in relation to the provision of health services to the now deceased individual.

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. As such, I consider the personal affairs information concerns these individuals in their professional roles, rather than in a personal or private capacity. This means the information is not particularly sensitive.

I accept that the medical treatment information of the Applicant's deceased family member was collected during the provision of medical care meaning it is inherently more sensitive.

(c) The Applicant's interest in the information

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).⁷

I acknowledge the Applicant has a personal and compelling interest in seeking access to their deceased parent's medical records and as a next of kin.

⁷ *Victoria Police v Marke* [2008] VSCA 218 at [104].

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

As stated above, I consider the Applicant has a personal interest in obtaining access to the document in full.

In respect to whether a public interest would be promoted by disclosure, I acknowledge the public interest is served when disclosure of information held by an agency provides for accountability in the conduct of that agency's statutory or governmental functions.

I consider there is a public interest in protecting the personal privacy of the third parties given the context in which the information was obtained and recorded by the Agency and the content of the information. However, in the circumstances, I also find there is a public interest in providing transparency around the provision of medical treatment and related health services to the individual prior to their death.

(e) The likelihood of disclosure of information, if released

As the FOI Act does not place any restrictions on an applicant's use or dissemination of documents obtained under FOI, this is to be interpreted by reference to the capacity of any member of the public to identify a third party.⁸

Accordingly, I have considered the likelihood of the personal affairs information in the document being further disseminated, if disclosed, and the effects broader disclosure of this information would have on the privacy of the relevant third parties.

There is no information before me to suggest the Applicant is likely to further disclose the information in the circumstances.

(f) 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 (or their next of kin, if deceased) 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.⁹ However, this obligation does not arise in certain limited circumstances, including where it is not practicable to do so.¹⁰

The Agency determined it was not practicable to consult with Agency staff and noted the application was made by the deceased person's next of kin.

I accept Agency staff may have differing views depending on varying factors regarding release of their personal affairs information, however, these have not been put before me for consideration. I note that personal affairs information of Agency staff and medical professionals was acquired by the Agency during their usual work duties and responsibilities in providing medical treatment.

Notwithstanding the Applicant's next of kin status, in its submission, the Agency submitted:

The level of detail that the remaining document provided would likely go beyond what the patient would expect or want to be released to family members... Further a patient's right to privacy protection continues post death.

⁸ Ibid at [68].

⁹ Section 33(2B).

¹⁰ Section 33(2C).

While I accept the deceased person retains certain rights to privacy post death, I consider the status of the Applicant as next of kin provides a greater weight of influence in this matter. While it is not determinative, if another applicant sought access to the document it would be the Applicant who would be notified and have their view sought regarding release of the information.

The Applicant's interest in the document and status therefore weighs in favour of disclosure.

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

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.¹²

There is nothing before me to suggest this is a factor here.

22. Having weighed the above factors, on balance, I am satisfied that limited personal affairs information concerning Agency officers such as their signatures and contact information is exempt from release in the circumstances.
23. I am, however, satisfied that it would not be unreasonable to release the names and position titles of medical professionals where this information was acquired as part of their professional roles.
24. As the Applicant has already been provided some of the requested information outside the FOI Act in their capacity as next of kin, I do not accept the remaining information is sufficiently sensitive that it cannot be released to them.
25. Accordingly, I am satisfied disclosure of the remaining personal affairs information in the document would not be unreasonable, and is not exempt from release under section 33(1).

Section 35(1)(b) – Information obtained in confidence

26. 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.

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

27. Whether information was communicated in confidence to an agency is a question of fact.¹³
28. When determining whether information was communicated in confidence, it is necessary to consider the position from the perspective of the communicator.¹⁴
29. Confidentiality can be expressed or implied from the circumstances of a matter.¹⁵

¹¹ Section 33(2A).

¹² Section 33(2A).

¹³ *Ryder v Booth* [1985] VR 869 at 883; *XYZ v Victoria Police* [2010] VCAT 255 at [264].

¹⁴ *Ibid*; *XYZ* at [265].

¹⁵ *Ibid*.

30. The pages subject to review form part of the deceased person's medical record. They constitute notes written by medical professionals that relate to the deceased person and other third parties who provided information to the Agency in relation to the patient in the context of them receiving medical care.

31. The Agency submits:

We submit that the progress notes in particular contain:

- patient introductions;
- required documentation such as safety checks and risk assessments
- clinical observations including heart rates and fluid balances;
- orders of nurses, registrars and other treating practitioners;
- changes in clinical state; and
- Interventions given.

We submit that these documents are a health care professional's means to document the patient status and serves as a method to plan ongoing care and communicate findings. These documents can also include past and present illnesses. The information in these notes could include matters that require documentation from every 15 minutes, hourly, to once per shift depending on the needs of the care level of the patient at any given time.

32. I have carefully considered the information in the document and the context in which it was provided by the patient to the Agency. Given the sensitivity of the circumstances and the personal nature of seeking medical care, I consider it is reasonably likely the patient communicated the information to the Agency with an expectation it would remain confidential.

33. Accordingly, I am satisfied information in the document was communicated in confidence by the patient to the Agency.

Would disclosure of the document 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?

34. The public interest test in section 35(1)(b) is limited to determining whether disclosure of the confidential information in the document would be reasonably likely to impair the Agency's ability to obtain similar information in the future.

35. In the context of the Agency, being a public hospital, the voluntary provision of sensitive information by patients is 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.

36. The Agency submits:

In relation to the second limb of section 35(1)(b), it is submitted that there is a public interest in hospital and medical treatment being safe and of a high quality, and that the safety and quality of treatment depends to a large extent on the completeness and accuracy of the private information provided by the patient. However, if a patient thought that his or her private information could be obtained through the freedom of information process, the patient may be disinclined to share necessary information with the treating team. Therefore disclosure of personal information obtained during treatment would be contrary to the public interest.

37. I acknowledge the Applicant's personal interest and right to obtain access to the medical records of deceased parent given their status of next of kin. Further, I accept a decision by an agency to refuse

access to certain information in a personal medical record (even a small amount of information) could understandably cause them concern and possible frustration.

38. However, information in a person's medical record, while concerning them as a patient and providing a clinical record of their health issues and treatment provided, also commonly includes information obtained by the hospital, or a medical practitioner or other agency medical staff, with a view to assisting the public health service to provide the patient with timely and effective medical care.
39. I consider there is an essential public interest in a patient being able to provide what is often sensitive and confidential information about themselves to a medical practitioner and other Agency staff.
40. I also consider disclosure of particularly sensitive personal information provided by a patient in confidence to the Agency, or a medical practitioner or other Agency staff, would be contrary to the public interest. If patients were aware the information they provide to the Agency was routinely disclosed under the FOI Act, I consider they would be reluctant to communicate such information to the Agency in the future. As such, I consider this would have a significant and detrimental impact on the Agency's ability to provide medical treatment and appropriated care to patients.
41. However, in this case, where the Applicant is the deceased person's next of kin, and having reviewed the relevant information to which the Applicant seeks access, I am satisfied the information is not of a particularly sensitive nature such that its disclosure would impair the Agency's ability to obtain similar information from patients in the future.
42. Accordingly, I am not satisfied information in the document is exempt from release under section 35(1)(b).

Section 25 – Deletion of exempt or irrelevant information

43. 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.
44. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'¹⁶ 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 25.¹⁷
45. I have considered whether it is practicable to provide the Applicant with an edited copy of the document 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 document would retain meaning.

Conclusion

46. On the information before me, I am satisfied certain information in the document is exempt from release under section 33(1). However, I am not satisfied other information is exempt from release under sections 33(1) or 35(1)(b).
47. As I am satisfied it is practicable to provide the Applicant with an edited copy of the document with exempt information deleted in accordance with section 25, access is granted in part.

¹⁶ *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].

¹⁷ *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

48. 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.¹⁸
49. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹⁹
50. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.²⁰
51. 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.
52. 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.²¹

Third party review rights

53. As I have determined to release the personal affairs information of third parties, to which the Agency refused access under section 33(1), 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.²²
54. Having considered the nature of the document, the information to be disclosed, the passage of time since the document was created and the number of third parties whose personal affairs information appears in the document, I am satisfied it is not practicable to notify those persons of their review rights.

When this decision takes effect

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

¹⁸ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

¹⁹ Section 52(5).

²⁰ Section 52(9).

²¹ Sections 50(3F) and 50(3FA).

²² 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.	Various	Digital medical record – Summaries and operation notes for [named person]	53	Released in full	Not subject to review	
2.	[date] to [date]	Digital medical record for [named person]	309	Released in part Sections 33(1), 35(1)(b)	Release in part Sections 33(1), 35(1)(b), 25 The document is to be released except for the following information, which is exempt from release under section 33(1), and is to be deleted in accordance with section 25: (a) signatures of third parties; and (b) telephone numbers of third parties.	<p>Section 33(1): For the reasons set out in the Notice of Decision above, I am not satisfied disclosure of the names, initials and position titles of Agency officers and third parties would be unreasonable in the circumstances of this matter.</p> <p>However, I am satisfied disclosure of the signatures and telephone numbers of third parties would be unreasonable for the reasons outlined in the Notice of Decision above.</p> <p>Section 35(1)(b): Having carefully examined the document, I am satisfied the information was provided in confidence to the Agency.</p> <p>However, I am not satisfied the information exempted by the Agency under 35(1)(b) is exempt under that provision, for the</p>

Document No.	Date of Document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
						<p>reasons provided in the Notice of Decision, above.</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>