

Notice of Decision and Reasons for Decision

Applicant:	'EH7'
Agency:	Peninsula Health
Decision date:	4 March 2022
Exemptions considered:	Sections 30(1), 33(1)
Citation:	'EH7' and Peninsula Health (Freedom of Information) [2022] VICmr 98 (4 March 2022)

FREEDOM OF INFORMATION – hospital documents – health care review – root cause analysis – personal affairs information – internal working document

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 the document in part.

I am satisfied certain information in the document is exempt from release under sections 30(1) and 33(1).

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 to the document is granted in part.

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

The document is to be released with exempt information deleted in accordance with section 25 as recorded in the marked-up version of the document provided to the Agency with this decision.

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner

4 March 2022

Reasons for Decision

Background to review

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

Root cause analysis report on the [clinical event]
2. In its decision, the Agency identified one document falling within the terms of the Applicant's request and refused access to the document in full under section 30(1). The Agency's decision letter sets out the reasons for its decision.

Review

3. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access to the document.
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.

Preliminary view

9. In its submission, the Agency sought to also rely on an additional exemption under section 35(1)(b) to refuse access to the document.
10. During the review, the Agency was provided with my preliminary view that certain information in the document is not exempt under sections 30(1), 33(1) or 35(1)(b). The Agency was provided with a marked up version of the document, reflecting my preliminary view on the application of these exemptions to the document. The Agency was invited to provide a further submission, agree to release information or consider making a fresh decision under section 49M.
11. In response, the Agency agreed to release additional information in the document in accordance with my preliminary view, except for two sections. In effect, the Agency agreed to release further information it had exempted from release under section 30(1). Accordingly, the relevant information is to be released to the Applicant.
12. Following the Agency's agreement to release further information, it sought to rely on a further additional exemption under section 33(1) to exempt the position titles and signatures of Agency officers. The Agency also provided further information in support of its view that other information in the document is exempt from release under section 30(1).
13. Accordingly, my review will consider the application of sections 30(1) and 33(1).

Root cause analysis

14. The Victorian Department of Health website provides the following information about ‘Root Cause Analysis’:

Root cause analysis (RCA) is a process analysis used to identify the underlying causes of system failures.

It provides the information needed to solve problems and address these failures.

Clinical risk managers and other healthcare personnel use RCA to help them find answers to the questions posed by serious incidents. They investigate what happened, why it occurred, and what can be done to prevent it from happening again.

RCA investigations should be led by a trained facilitator.

When to undertake root cause analysis

RCA is normally only performed on high-risk, high-impact events, such as sentinel events or incidents that have an incident severity rating of one (ISR 1).¹

15. Accordingly, a root cause analysis is a review process that seeks to identify why a serious medical incident involving a patient occurred with a view to ensuring a similar event does not reoccur or the risk of a similar event occurring is minimised. Such reviews are conducted so as not to attribute blame on any person or persons, but rather to serve a broader purpose of identifying any systemic failures in medical care or services provided by a hospital to a patient that need to be addressed.

Review of exemptions

Section 30(1) – Internal working documents

16. 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.

17. The exemption does not apply to purely factual information in a document.²

18. 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).³

Does the document 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?

19. 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.⁴

¹ Department of Health, *Clinical incident investigations – root cause analysis* (Web Page, 11 November 2021) <health.vic.gov.au/quality-safety-service/clinical-incident-investigations-root-cause-analysis>.

² Section 30(3).

³ See *Koch v Swinburne University* [2004] VCAT 1513 at [15]; *Thwaites v Department of Human Services* (No 2) (1998) 14 VAR 347.

⁴ *Mildenhall v Department of Education* (1998) 14 VAR 87.

20. Having considered the content and context of the document, I am satisfied it contains 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?

21. 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.⁵
22. In *Re Waterford and Department of Treasury (No.2)*,⁶ 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.

23. I am satisfied the information was provided in the course of the Agency's deliberative processes in relation to its review of clinical incidents for the purpose of identifying any systemic failures that need to be addressed.

Would disclosure of the documents be contrary to public interest?

24. 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:⁷
- (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;
 - (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

⁵ *Brog v Department of Premier and Cabinet* (1989) 3 VAR 201 at 208.

⁶ [1984] AATA 67; (1984) 5 ALD 588; 1 AAR 1 at [58].

⁷ *Hulls v Victorian Casino and Gambling Authority* (1998) 12 VAR 483.

- (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.
25. The Agency submits disclosure of the document in full would be contrary to the public interest, as:
- (a) the document contains sensitive information;
 - (b) disclosure would inhibit the independence of medical staff when undertaking quality assessment reviews in the future; and
 - (c) disclosure would adversely affect the effectiveness of the Agency's investigative processes.
26. Having reviewed the document, the circumstances of this matter and the purpose for which the document was created, I have determined disclosure of information in the document would be contrary to the public interest for the following reasons:
- (a) I agree with the Agency's submission the document contains sensitive information relating to an investigation into a clinical event arising from a patient's medical treatment and care received from a public hospital.
 - (b) I acknowledge the Applicant's genuine interest in seeking access to documents to properly understand the events associated with the [clinical event
 - (c) I accept when serious clinical incidents occur that result in serious harm to, or the death of a patient while in the care of a public hospital, there is a public interest in those persons who are directly impacted being informed of the cause of the incident. Public knowledge of these events allows for informed decision making by patients regarding medical treatment and 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 processes employed to investigate serious clinical incidents to be undermined by the release of findings under the FOI Act. Given such investigations and their findings 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) I accept root cause analysis panel members may be less willing to provide fulsome and detailed advice as part of a clinical review if such reports were to be routinely released under FOI. Further, the implications of this would undermine the robustness of the Agency's investigative processes into these types of serious events which would undermine the opportunity for the Agency to identify the cause of a serious clinical incident and any necessary action required to avoid the reoccurrence of a similar event in the future.
 - (f) It is essential for the public to have confidence that when a serious event occurs in a public hospital it will be thoroughly investigated, that any appropriate measures identified are put in place to remove or 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 in providing for exemptions that apply to information to which access may be refused.⁸
27. On balance, I am satisfied disclosure of certain information in the document would be contrary to the public interest.
28. Accordingly, I am satisfied this information is exempt from release under section 30(1).

⁸ Section 3.

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

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**); and
- (b) such disclosure would be ‘unreasonable’ in the circumstances.

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

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.⁹

31. As noted above, the remaining personal affairs information is the signature and position titles of third parties.

32. I am satisfied the signature and position titles of Agency officers are ‘personal affairs information’ for the purposes of section 33(1).

Would the disclosure of personal affairs information of third parties be unreasonable in the circumstances?

33. 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.¹⁰

34. The disclosure of a document under the FOI Act is unconditional and unrestricted, which means an applicant is free to disseminate widely or use a document as they choose.¹¹

35. 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’.¹²

36. 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.¹³

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:¹⁴

- (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 and whether their purpose for seeking the information is likely to be achieved;
- (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;

⁹ Section 33(9).

¹⁰ *Re Page v Metropolitan Transit Authority* (1988) 2 VAR 243 at 245-6.

¹¹ *Victoria Police v Marke* [2008] VSCA 218 at [68].

¹² [2008] VSCA 218 at [104].

¹³ *Coulson v Department of Premier and Cabinet (Review and Regulation)* [2018] VCAT 229.

¹⁴ *Ibid.*

- (f) the likelihood of further disclosure of the information, if released;
 - (g) the likelihood disclosure would cause distress or anxiety to individuals it relates to; and
 - (h) whether disclosure of the information or would be reasonably likely to endanger the life or physical safety of any person.¹⁵
38. The personal affairs information is the position titles of Agency staff members who were involved in the medical treatment relating to the [clinical event] and the signature of an Agency officer involved in the root cause analysis.
39. The information was acquired by the Agency in the course of the Agency staff members' usual work duties and responsibilities in providing medical treatment to a patient. As such, I consider the personal affairs information concerns these individuals in their professional roles, rather than in a personal or private capacity.
40. As noted above, I consider the context and purpose of the document is sensitive. I accept the position titles of individuals featured in the document is sensitive information.
41. I acknowledge the Applicant's interest in the personal affairs information as described above. However, it is unclear whether the release of the personal affairs information in the document would further assist them in understanding the events, given the substantive and relevant information that the Agency has agreed to release.
42. There is no information before me in relation to the views of the third parties. Given the circumstances of this matter, I am of the view the individuals to whom the information relates would likely object to the disclosure of their personal affairs information.
43. Further, for the reasons described above, I consider the information provided by those individuals to the Agency is critical for the conduct of a thorough and robust in depth case review into a serious clinical event.
44. Given the circumstances of this matter, I am satisfied disclosure of the personal affairs information would cause distress to the individuals to whom it relates.
45. Having considered the above factors, I am satisfied disclosure of certain personal affairs information would be unreasonable in the circumstances.
46. Accordingly, I am satisfied certain personal affairs information in the document is exempt from release under section 33(1).

Section 25 – Deletion of exempt or irrelevant information

47. 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.
48. 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

¹⁵ Section 33(2A)

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].

49. I have considered the effect of deleting exempt information from the document 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 edited document would retain meaning.

Conclusion

50. On the information before me, I am satisfied certain information in the document is exempt from release under sections 30(1) and 33(1).
51. 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 to the document is granted in part.
52. The document is to be released with exempt information deleted in accordance with section 25 as recorded in the marked-up version of the document provided to the Agency with this decision.

Review rights

53. 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
54. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹⁹
55. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.²⁰
56. 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.
57. 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

58. As stated above, the Agency agreed further information in the document could be released, including the personal affairs information of third parties. Therefore, as I have determined to release 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.²²
59. In the circumstances, I have decided notifying the relevant third parties of their review rights is not practicable. I consider it would be an unnecessary intrusion to notify the third parties having considered the personal affairs information to be released is the position titles of persons of the root cause analysis review team and the name of the senior Agency officer who endorsed the report.
60. Given the seniority of their roles, I consider the third parties would be unlikely to object to disclosure of this information which concerns their professional roles and their involvement in the root cause analysis is not sensitive.

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) and 52(3).

When this decision takes effect

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

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	No. of Pages	Agency Decision	OVIC Decision	OVIC Comments
1.	[date]	Root Cause Analysis	31	Released in part Sections 30(1), 33(1)	Release in part Sections 30(1), 33(1), 25 The document is to be released with exempt information deleted in accordance with section 25, as recorded in the marked-up version of the document provided to the Agency with this decision.	<p>Section 30(1): For the reasons outlined in the Notice of Decision above, I am satisfied certain information in the document is exempt from release under section 30(1).</p> <p>Section 33(1): For the reasons outlined in the Notice of Decision above, I am satisfied certain information in the document is exempt from release under section 33(1).</p> <p>Section 25: 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. Accordingly, access to the document is granted in part.</p>