

Notice of Decision and Reasons for Decision

Applicant:	'EF1'
Agency:	Eastern Health
Decision date:	15 February 2022
Exemptions considered:	Sections 33(1), 35(1)(b)
Citation:	'EF1' and Eastern Health (Freedom of Information) [2022] VICmr 73 (15 February 2022)

FREEDOM OF INFORMATION – medical records – health records – deceased family member – deceased parent – next of kin – personal affairs information – unreasonable disclosure – information obtained in confidence – disclosure contrary to the public interest

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 is the same as the Agency's decision.

I am satisfied personal affairs information of third parties is exempt from release under section 33(1), and confidential information provided by third parties is exempt from release under section 35(1)(b).

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner
15 February 2022

Reasons for Decision

Background to review

1. The Applicant made a freedom information request to the Agency seeking access to a complete copy of their deceased parent's medical record held by the Agency.
2. The Agency identified 31 documents falling within the terms of the Applicant's request and refused access to certain documents in part under sections 33(1) and 35(1)(b). The Agency's decision letter sets out the reasons for its decision.

Review application

3. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access to the documents in part.
4. During the review, the Applicant advised they seek review of [certain information] and do not require access to the names and email addresses of Agency officers. Accordingly, my review concerns the specified pages and information in the documents.
5. I have examined a copy of the relevant pages subject to review.
6. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review. I have considered all communications and submissions received.
7. During the review, OVIC staff confirmed with the Agency that it accepts the Applicant is a next of kin for their deceased parent. I also accept the Applicant is a next of kin for the purposes of the FOI Act.
8. 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.
9. 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) – *Personal affairs information of third parties*

10. 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 (including a deceased person) other than the Applicant (a **third party**);¹ and
 - (b) such disclosure would be 'unreasonable'.

¹ Sections 33(1) and 33(2).

Do the documents contain personal affairs information of third parties?

11. Information relating to a person's 'personal affairs' includes information that identifies any person or discloses their address or location. It also includes any information from which such information may be reasonably determined.²
12. A third party's opinion or observations about another person's conduct can constitute information in relation to the personal affairs of a third party.³
13. A document will disclose the personal affairs information of a third party if the information is capable of directly or indirectly identifying the third party.
14. The Victorian Civil and Administrative Tribunal (**VCAT**) has interpreted the scope of 'personal affairs information' broadly to include matters relating to health, private behaviour, home life or personal or family relationships of individuals.⁴
15. The documents subject to review are part of the Applicant's late [parent's] medical record. The documents contain the names of third parties (excluding Agency officers) as well as notes relating to the care of the deceased person and their medical and personal history.
16. I am satisfied the documents contain the personal affairs information of third parties, including the deceased person and other persons. While I acknowledge certain information in the documents was provided to the Agency by the Applicant, where such information contains references to a third party, this information still constitutes the personal affairs information of the third party for the purposes of section 33(1).
17. Accordingly, I am satisfied the documents contain the personal affairs information of third parties for the purposes of section 33(1).

Would disclosure of the personal affairs information be unreasonable?

18. The concept of 'unreasonable disclosure' involves the balancing of 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.
19. The Supreme Court of Victoria Court of Appeal has held there is 'no absolute bar to providing access to documents which relate to the personal affairs of others', and 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 s33(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
20. In determining whether disclosure of personal affairs information in the documents would be unreasonable in this matter, I have considered the following factors:

² Section 33(9).

³ *Richardson v Business Licensing Authority* [2003] VCAT 1053, cited in *Davis v Victoria Police (General)* [2008] VCAT 1343 at [43], *Pritchard v Victoria Police (General)* [2008] VCAT 913 at [24], *Mrs R v Ballarat Health Services (General)* [2007] VCAT 2397 at [13].

⁴ *Re F and Health Department* (1988) 2 VAR 458 as quoted in *RFJ v Victoria Police FOI Division* [2013] VCAT 1267 at [103].

⁵ [2008] VSCA 218 at [76].

⁶ *Ibid* at [79].

- (a) The nature of the personal affairs information and the circumstances in which the information was obtained

I consider health and other personal information in the medical records is sensitive and confidential in nature. The personal affairs information was obtained by the Agency in the course of providing patient health services and medical treatment to the Applicant's deceased parent.

- (b) The likelihood of further disclosure of the information, if released under the FOI Act

The nature of disclosure under the FOI Act is unconditional and unrestricted. This means an applicant is free to disseminate widely or use a document as they choose once it is released.⁷ Accordingly, I must consider the likelihood and potential effect of further dissemination of a third party's personal affairs information if released.

Based on the information before me, I am satisfied the Applicant is likely to disclose the information to the Coroner's Court of Victoria for the purpose of pursuing an investigation against the Agency. However, given the sensitive nature of the documents, being a medical record containing personal affairs information of third parties, I consider the document could be distributed more widely which would impact the privacy of the relevant third parties.

- (c) The extent to which the information is available to the public

The information provided to the Agency and recorded in the medical record is confidential and not publicly available.

- (d) The Applicant's interest in the information, and whether their purpose for seeking the information is likely to be achieved by disclosure

The Applicant seeks access to the documents in full to obtain further information about the Agency for the purposes of a coronial investigation. I acknowledge the Applicant's strong personal access to the documents.

From my review of the documents, I note the majority of the information exempted from release by the Agency does not provide significant details about the conduct of the Agency beyond what was released by the Agency to the Applicant in its decision. Accordingly, I consider it is reasonably likely the Applicant's purpose for seeking access to the information is unlikely to be achieved by disclosure.

- (e) Whether any public interest that would be promoted by the release of the information

I acknowledge the Applicant's personal interest in seeking full access to the documents, which concern their deceased parent. As such, I consider their interest in obtaining access would serve their personal interest.

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.

Having reviewed the documents, I am not satisfied the public interest would be promoted by release of the sensitive personal affairs information of third parties under the FOI Act. Rather, I consider there is public interest in protecting the personal privacy of the third parties given

⁷ [2008] VSCA 218 at [68].

the context in which the information was obtained and recorded by the Agency and the content of the information.

While not a determinative factor in my decision, should the Coroner's Court of Victoria determine information in the medical records is of relevance to a coronial investigation, it has powers under the *Coroners Act 2008* (Vic) to require the production of the documents.

- (f) Whether the individuals to whom the information relates (or their next of kin) object, or would be likely to object, to the release of information

In determining whether disclosure of a document would involve the unreasonable disclosure of a third party's personal affairs information, with the exception of certain circumstances,⁸ an agency must notify that person (or their next of kin, if the third party is deceased) an FOI request has been received for documents containing their personal affairs information and seek their view as to whether disclosure of the document should occur.⁹

As stated above, there is no concern regarding the Applicant being a next of kin of their deceased parent. However, while I accept the Applicant seeks the release of the information as a next of kin and has a right to access such information where it concerns their parent, I must also consider the interest in protecting the right to privacy of other third parties referenced in the documents.

In this case, there are several third parties who do not consent to the disclosure of their personal affairs information under the FOI Act, and the information provided or recorded by them forms the bulk of the information the Agency exempted from release.

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

In determining whether disclosure of personal affairs information would be unreasonable, I am required to take into account whether or not disclosure of the information would be reasonably likely to endanger the life or physical safety of any person.¹⁰ I am satisfied this factor is not relevant in this case.

21. Having weighed the above factors, on balance, I am satisfied disclosure of the personal affairs information of persons other than the Applicant's deceased parent would be unreasonable and is exempt under section 33(1).

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

22. In relation to Document 25, the Applicant seeks review of the Agency's reliance on section 35(1)(b) to refuse access to information communicated to the Agency by a third party or parties which is recorded in the progress notes relating to the deceased and their health care at the time.

23. A document is exempt from release 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 public interest as it would reasonably likely impair the ability of an agency or a Minister to obtain similar information in the future.

⁸ Section 33(2C).

⁹ Section 33(2B).

¹⁰ Section 33(2A).

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

24. When determining whether information was communicated in confidence it is necessary to consider the position from the perspective of the communicator.¹¹
25. Confidentiality can be expressed or implied having regard to the circumstances of a particular matter.¹²
26. I am satisfied the information was communicated to the Agency by any third parties on a voluntary basis.
27. I have carefully considered the information in Document 25 and the context in which it was provided to the Agency, I consider it is reasonably likely any third parties communicated the information to the Agency with an expectation it would remain confidential.
28. Accordingly, I am satisfied information in the document was communicated to the Agency in confidence.

Would disclosure be contrary to the public interest in that it would be reasonably likely to impair the ability of the Agency to obtain information of a similar nature in the future?

29. For the exemption under section 35(1)(b) to apply, I must be satisfied disclosure of the information would impair the ability of the Agency to obtain similar information in the future. For example, a person in the position of the communicator would be reasonably likely not to provide similar information to the Agency in the future.
30. I consider conversations between healthcare services and third parties to be personal and sensitive, often occurring at vulnerable and emotional times.
31. I acknowledge the Applicant has a genuine interest in seeking access to their late [parent's] medical record in full to understand the events that occurred whilst they were in the care of the Agency. I also acknowledge redactions made to documents concerning medical treatment, patient care and other personal matters, can create a sense of frustration for an applicant, regardless of whether a small amount of material is withheld only. However, having considered the content of the documents subject to review, I consider the information already released to the Applicant provides pertinent information about the care provided and the further release of information may not add to this understanding.
32. 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.
33. I further consider the expectation of confidential communication is a factor which supports the process of third parties seeking or providing information about the medical care of others and their involvement with it with candour. 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 freely and without fear of disclosure. In my view, disclosure of this type of information would inhibit the full and informed engagement of third parties involved in care, leading to adverse health impacts for patients.

¹¹ XYZ v Victoria Police [2010] VCAT 255 at [265].

¹² Ibid.

34. In balancing these competing interests, I am satisfied greater weight must be given to ensuring the confidence with which such information is provided to the Agency is preserved in the interests of ensuring patient health and wellbeing. Accordingly, in relation to the information subject to review, I am satisfied disclosure of this information would be contrary to the public interest as it would impair the ability of the Agency to obtain similar information in the future.

Section 25 – Deletion of exempt or irrelevant information

35. 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.
36. Determining what is ‘practicable’ requires consideration of the effort and editing involved in making the deletions ‘from a resources point of view’¹³ 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 25.¹⁴
37. I have considered the effect of deleting exempt information from the documents 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 documents would retain meaning.

Conclusion

38. On the information before me, I am satisfied the information exempted from release under sections 33(1) and 35(1)(b) by the Agency [in the specific parts] of the documents subject to review is exempt from release and is to remain deleted.
39. As I am satisfied it is practicable to provide the Applicant with an edited copy of the relevant pages with exempt information deleted in accordance with section 25, access to the documents is granted in part.

Review rights

40. If the Applicant is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.¹⁵
41. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹⁶
42. 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.
43. The Agency is required to notify the Information Commissioner in writing as soon as practicable if it becomes aware the Applicant has applied to VCAT for a review of my decision.¹⁷

¹³ *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].

¹⁴ *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].

¹⁵ Section 50(1)(b).

¹⁶ Section 52(5).

¹⁷ Sections 50(3F) and 50(3FA).