

Notice of Decision and Reasons for Decision

Applicant: 'EH4'
Agency: Bendigo Health Care Group
Decision date: 9 February 2022
Exemptions considered: Sections 33(1), 35(1)(b)
Citation: 'EH4' and Bendigo Health Care Group (Freedom of Information) [2022]
VICmr 95 (9 February 2022)

FREEDOM OF INFORMATION – medical records – health records – patient – progress notes – discharge summary – personal affairs information – disclosure unreasonable – information communicated in confidence

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.

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

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner
9 February 2022

Reasons for Decision

Background to review

1. The Applicant made a freedom of information request to the Agency seeking access to their medical records held by the Agency.
2. The Agency identified documents falling within the terms of the Applicant's request and refused access to 81 pages in part under the exemptions in 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 certain information in the documents.
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.

Review of exemptions

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

9. 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'.

Do the documents contain the 'personal affairs information' of individuals other than the Applicant?

10. 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.²
11. 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

¹ Sections 33(1) and (2).

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].

12. I also note, 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
13. The documents contain the names, position titles, opinion and observations of healthcare professional's and the names and other identifying information of third parties.
14. Accordingly, I am satisfied the documents contain the 'personal affairs information' of third parties for the purposes of section 33.

Would disclosure of the personal affairs information in the documents be unreasonable?

15. The concept of 'unreasonable disclosure' involves balancing the public interest in disclosure of official information with the interest in protecting an individual's right to personal privacy in the circumstances.
16. 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
17. 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.⁶
18. In determining whether disclosure of a third party's personal affairs information in the document would be unreasonable in this matter, I have considered the following factors:

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

The information was obtained by the Agency in the course of providing medical treatment to the Applicant.

Having regard to the content of the personal affairs information and the setting in which it was provided, I consider the information is sensitive, personal and confidential in nature.⁷

I am satisfied the authors had a reasonable expectation the information would be treated in confidence and would not to be disclosed to a third party, including under the FOI Act.

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

The FOI Act provides a general right of access that can be exercised by any person, regardless of their motive for seeking access to the document. However, the reasons why an applicant seeks access to a document is a relevant consideration in determining whether disclosure would be reasonable.⁸

In their correspondence with OVIC, the Applicant makes a number of allegations regarding Agency staff. The Applicant also submits they seek access to the documents for potential litigation and evidentiary purposes.

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 *Victoria Police v Marke* [2008] VSCA 218 at [76].

⁶ *Coulson v Department of Premier and Cabinet (Review and Regulation)* [2018] VCAT 229.

⁷ *Page v Metropolitan Transit Authority* [1988] 2 VAR 243 at [246].

⁸ *Ibid* at [104].

Having reviewed the Applicant's submission and correspondence, I consider the allegations are serious in nature.

While I acknowledge the Applicant's stated interest in obtaining access to the document and the seriousness of their allegations, I am unable to determine on the information before me whether its disclosure would assist the Applicant in relation to their stated purpose.

(c) Whether any public interest would be promoted by release of the information;

While I acknowledge the Applicant's personal interest in obtaining access to the documents in full, in my view, the public interest weighs in favour of preserving the Agency's ability to obtain information in confidence from patients and third parties in their capacity and for the purpose of providing a patient with medical treatment and patient care.

In the event such information were to be routinely released under the FOI Act, I am satisfied the integrity and efficacy of the Agency's primary purpose would be compromised. Accordingly, I consider this broader public interest outweighs the Applicant's personal interest in obtaining access to the documents.

(d) Whether the individuals to whom the information relates, object, or would be likely to object, to the release of the information

The Agency was unable to contact all third parties as it was considered unreasonable due to the number of third parties and the sensitivity of the documents.

On the information before me, I am satisfied the relevant third parties would object to the disclosure of their personal affairs information in the documents.

(e) The likelihood of further disclosure of the information, if disclosed to the Applicant; and

The FOI Act does not impose any conditions or restrictions on an applicant's use of documents disclosed under the FOI Act. Accordingly, it is necessary to consider the likelihood and potential effects of further dissemination of the third party's personal affairs information if released.

Having considered the Applicant's intended use for the documents, I am of the view it is reasonably likely the personal privacy of the third parties' will be impacted should their personal affairs information be disclosed.

(f) Whether disclosure of the information would, or would be reasonably likely to endanger the life or physical safety of any person⁹

In determining if release of personal affairs information would be unreasonable, I am required to consider whether or not disclosure of the personal affairs information would be reasonably likely to endanger the life or physical safety of any person.¹⁰ Having considered the circumstances of the matter, I consider this to be a relevant factor.

19. Having weighed up the above factors, on balance, I am satisfied disclosure of the personal affairs information of all third parties named or identified in the documents would be unreasonable in the circumstances.

⁹ Section 33(2A).

¹⁰ Ibid.

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

20. The Agency relies on section 35(1)(b) to refuse access to information communicated to the Agency by third parties which is recorded in the clinical assessment and progress notes.
21. 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.

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

22. Whether information communicated was communicated in confidence is a question of fact.¹¹
23. When determining whether information was communicated in confidence, it is necessary to consider the position from the perspective of the communicator.¹²
24. Confidentiality can be expressed or implied from the circumstances of a matter.¹³
25. The Agency was unable to consult with the third parties who provided the information.
26. 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.
27. I am satisfied the information was communicated to the Agency by third parties on a voluntary basis.
28. I have carefully considered the information in the documents and the context in which it was provided to the Agency and I consider it is reasonably likely the third parties communicated the information to the Agency with an expectation it would remain confidential.
29. Accordingly, I am satisfied information in the documents was communicated to the Agency in confidence by third parties.

Would disclosure 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?

30. In determining whether disclosure of the information would be contrary to the public interest, I must consider whether its disclosure would be reasonably likely to impair the Agency's ability to obtain similar information in the future.
31. I acknowledge the information deleted in the documents by the Agency is important to the Applicant. I also acknowledge redactions made to documents concerning an applicant's 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, as the applicant may simply wish for a complete copy of their medical and health records

¹¹ *Ryder v Booth* [1985] VR 869 at 883; *XYZ v Victoria Police* [2010] VCAT 255 at [264].

¹² *Ibid*; *XYZ* at [265].

¹³ *Ibid*.

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. By its nature, such information is generally highly 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 and healthcare to its patients.
34. 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.
35. I also consider disclosure of the information would be contrary to the interests of patients in receipt of medical treatment and other health services. If third parties, who provide confidential information to the Agency in relation to patients, were aware information of this nature was routinely disclosed under the FOI Act, they would be reasonably likely to be reluctant to communicate similar information to the Agency in the future.
36. I am also of the view, if individuals are unable to speak freely and provide information to medical and other hospital staff, the appropriateness and quality of care provided to patients may suffer. I consider this would be a further significant and detrimental outcome for the Agency and similar health providers.
37. In these circumstances, I am satisfied disclosure of the information exempted by the Agency in the documents would be contrary to the public interest as it would be likely to impair the Agency's ability to obtain similar information in the future.
38. Accordingly, I am satisfied the relevant information redacted by the Agency in Document is exempt under section 35(1)(b).

Conclusion

39. On the information before me, I am satisfied information the Agency exempted from release under sections 33(1) and 35(1)(b) is exempt and is to remain deleted.
40. Accordingly, my decision on the Applicant's request is the same as the Agency's decision and I have determined to grant access to the documents in part with exempt information deleted in accordance with section 25.

Review rights

41. If the Applicant is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.¹⁴
42. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹⁵
43. 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.
44. 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.¹⁶

¹⁴ Section 50(1)(b).

¹⁵ Section 52(5).

¹⁶ Sections 50(3F) and (3FA).