

## Notice of Decision and Reasons for Decision

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Applicant:	'E15'
Agency:	Northern Health
Decision date:	18 March 2022
Exemptions and provision considered:	Sections 33(1), 35(1)(b), 25
Citation:	'E15' and Northern Health ( <i>Freedom of Information</i> ) [2022] VICmr 105 (18 March 2022)

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FREEDOM OF INFORMATION – hospital records – mental health – applicant’s medical record – information provided in confidence – consent of third party – disclosure contrary to 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 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 where I have determined it is not exempt from release.

I am satisfied certain information in the document is exempt 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 information deleted in accordance with section 25, I have granted access to the document in part.

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

My reasons for decision follow.

**Joanne Kummrow**  
Public Access Deputy Commissioner  
18 March 2022

## Reasons for Decision

### Background to review

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

My full health record from the [Agency Mental Health services]
2. 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 certain information in the one document 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.
4. I have examined a copy of the document subject to review.
5. During the review, the Applicant advised they do not seek access to the names, date of birth and contact details of third parties.
6. The Agency also advised they no longer wished to rely on section 33(1) in relation to the document.
7. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
8. I have considered all communications and submissions received from the parties.
9. 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.
10. 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.
11. 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'.<sup>1</sup> 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 33(1) – Documents affecting personal privacy of third parties***

12. As noted above, the Applicant does not seek access to the names, dates of birth and contact details of third parties and the Agency no longer wishes to apply section 33(1). However, I note the Applicant seeks access to all information provided by other individuals and access to their own personal affairs information.

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

13. Given the personal affairs information of third parties is intertwined with information that could be considered as the Applicant's personal affairs information, and I understand this information is of importance to the Applicant, I have considered the application of section 33(1) to this information.
14. 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;<sup>2</sup> and
  - (b) such disclosure would be 'unreasonable'.

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

15. 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.<sup>3</sup>
16. 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.<sup>4</sup>
17. A third party's opinion or observations about another person's conduct can constitute information related to the third party's personal affairs.<sup>5</sup>
18. 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.<sup>6</sup>
19. The document contains the names, contact details, signatures, description of events and information regarding the health and personal relationships of individuals. I consider this information could be used (including with other information) to identify parties. Therefore, I am satisfied it constitutes personal affairs information for the purposes of section 33(1).

*Would disclosure of the personal affairs information be unreasonable?*

20. The concept of 'unreasonable disclosure' involves balancing the public interest in the disclosure of official information with the interest in protecting an individual's personal privacy in the particular circumstances.
21. In *Victoria Police v Marke*,<sup>7</sup> 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'.<sup>8</sup> The Court further held, '[t]he protection of privacy, which lies at the heart of [section] 33(1), is an

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<sup>2</sup> Sections 33(1) and 33(2).

<sup>3</sup> Section 33(9).

<sup>4</sup> *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].

<sup>5</sup> *Richardson v Business Licensing Authority* [2003] VCAT 1053, cited in *Davis v Victoria Police* [2008] VCAT 1343 at [43]; *Pritchard v Victoria Police* [2008] VCAT 913 at [24]; *Mrs R v Ballarat Health Services* [2007] VCAT 2397 at [13].

<sup>6</sup> *Re F and Health Department* (1988) 2 VAR 458 as quoted in *RFJ v Victoria Police FOI Division* [2013] VCAT 1267 at [103].

<sup>7</sup> [2008] VSCA 218 at [76].

<sup>8</sup> *Ibid.*

important right that the FOI Act properly protects. However, an individual's privacy can be invaded by a lesser or greater degree'.<sup>9</sup>

22. In determining whether disclosure of the personal affairs information would be unreasonable in the circumstances, I have considered the following factors:

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

The information constitutes notes made by Agency officers in the course of providing care to the Applicant in relation to their mental health while a hospital patient. The length of time since the information was recorded reduces its sensitivity, however, I consider the circumstances of the matter mean the information remains sensitive.

(b) The Applicant's interest in the information and, if relevant, 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 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 in the circumstances.<sup>10</sup>

I have considered information provided by the Applicant in support of their review application, including their submissions and reasons for seeking access to the document in full.

I understand the Applicant seeks information about any disclosures made to the Agency by third parties in the context of their medical care received from the Agency.

I acknowledge the Applicant's personal interest in obtaining access to the document in full to verify any inaccurate information and the particular importance of engaging in this process given their personal experiences, as described in their application and submissions.

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

Although I am of the view that supporting the needs of victim-survivors of family violence is a matter of broader public interest, I consider access to this document is a matter of personal interest to the Applicant.

It is also necessary to consider the public interest in maintaining the privacy of the third parties to whom the information also relates which is also a matter of public interest.

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

The FOI Act does not place any restrictions on an applicant's use or further dissemination of a document obtained under FOI.<sup>11</sup>

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

On the information before me, I consider the Applicant intends to access the information themselves and make further enquiries with the Agency if required, based on the content of the document. While there is no evidence before me to suggest that further disclosure

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<sup>9</sup> Ibid at [79].

<sup>10</sup> *Victoria Police v Marke* [2008] VSCA 218 at [104].

<sup>11</sup> *Victoria Police v Marke* [2008] VSCA 218 at [68].

is intended, given the sensitive nature of the document I must consider the potential effects of this further disclosure.

(e) 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 an FOI request has been received for a document containing their personal information and seek their view as to whether disclosure of the document should occur.<sup>12</sup> However, this obligation does not arise if:

- (a) the notification would be reasonably likely to endanger the life or physical safety of a person, or cause them undue distress, or is otherwise unreasonable in the circumstances;
- (b) the notification would be reasonably likely to increase the risk to the safety of a person experiencing family violence; or
- (c) it is not practicable to do so.<sup>13</sup>

There is no information before me to suggest the Agency undertook consultation with any third parties in relation to the release of their personal affairs information.

I have reviewed a consent form provided by the Applicant which indicates a third party consents to the Agency releasing information exempted under the FOI Act. While such consent is a relevant consideration, it is not determinative.

(f) Whether disclosure of the information would or would be reasonably likely to endanger the life or physical safety of any person<sup>14</sup>

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.<sup>15</sup>

In relation to the submission of the Applicant and the information before me, I am satisfied this is a relevant factor in this matter.

(g) Whether the disclosure would increase the risk to a primary person's safety from family violence<sup>16</sup>

In determining whether disclosure of information relating to the personal affairs of any person in a document would be unreasonable, section 33(2AB) requires if:

- (a) the request is made to an agency that is an information sharing entity or an authorised Hub entity, or to a Minister for access to an official document of an agency that is an information sharing entity or an authorised Hub entity; and
- (b) the document contains information relating to the personal affairs of the person making the request; and

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<sup>12</sup> Section 33(2B).

<sup>13</sup> Section 33(2C).

<sup>14</sup> Section 33(2A).

<sup>15</sup> Section 33(2A).

<sup>16</sup> Section 33(2AB).

- (c) the person making the request is a person of concern, or a person who is alleged to pose a risk of committing family violence—

in deciding whether the disclosure would involve the unreasonable disclosure of information relating to the personal affairs of any person, the agency or Minister must also take into account whether the disclosure would increase the risk to a primary person's safety from family violence.

Accordingly, I must consider whether disclosure of the document would increase the risk to the safety of a 'primary person'<sup>17</sup> from family violence.

I am satisfied this is a factor to consider in this matter.

23. Having weighed up the above factors, I am satisfied disclosure of certain third parties' personal affairs information in the document would be unreasonable in the circumstances, and is exempt under section 33(1).

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

24. 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.

#### *Was the information obtained in confidence?*

25. Whether information communicated by an individual to an agency was communicated in confidence is a question of fact.<sup>18</sup>
26. It is necessary to consider the position from the perspective of the communicator, noting confidentiality can be expressed or implied from the circumstances of a matter.<sup>19</sup>
27. The information provided to an Agency does not need to be truthful or accurate in order to be communicated in confidence and exempt under this provision.<sup>20</sup>
28. Based on the information before me, I am satisfied, at the time of the communication, the third parties had an expectation of confidentiality.
29. The Agency did not provide any indication of whether it consulted with the relevant third parties who provided the information in confidence to obtain their views on disclosure. Again, I note the Applicant provided OVIC with a consent form on behalf of a third party.
30. Accordingly, I am satisfied certain information was communicated in confidence by third parties to the Agency.
31. Where a document records information produced by the Agency in relation to its own activities, I do not consider it would disclose information obtained from a third party. Therefore, I am not satisfied such information was communicated in confidence and is not exempt under section 35(1)(b).

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<sup>17</sup> Section 33(9) provides 'primary person' has the meaning given in section 144E of the *Family Violence Protection Act 2008* (Vic). Section 144E of the *Family Violence Protection Act 2008* (Vic) provides 'a person is a *primary person* if an information sharing entity reasonably believes that the person may be subjected to family violence'.

<sup>18</sup> *Ryder v Booth* [1985] VR 869 at [883]; *XYZ v Victoria Police* [2010] VCAT 255 at [264].

<sup>19</sup> *XYZ v Victoria Police* [2010] VCAT 255 at [265].

<sup>20</sup> *Marke v Victoria Police (General)* [2006] VCAT 1364 at [56].

*Would disclosure of the information be contrary to the public interest?*

32. I must also consider whether the Agency would be impaired from obtaining similar information in the future if the information were to be disclosed under the FOI Act. This involves considering whether others in the position of the communicator would be reasonably likely to be inhibited or deterred from providing similar information to the Agency in the future should the information be disclosed.
33. The chances of future disclosure being impaired must be more than merely fanciful. Disclosure must be likely to significantly inhibit the provision of information from third parties in the future, not just to make them respond with slightly less candour than they otherwise would have.<sup>21</sup> I note the Applicant submits this is the case in relation to the information exempted by the Agency.
34. While I acknowledge the Applicant's submission in relation to the public interest factors in favour of release, the public interest test in section 35(1)(b) is narrow in that it is solely focused on the impact release would have on an agency's ability to obtain the same type of information in the future.
35. The Agency exempted from release duplicate entries it released to the Applicant in other entries. As the Agency determined this information is not exempt from release in the case of some entries, I am not satisfied it is exempt under section 35(1)(b) in respect of corresponding duplicate entries. I also consider the content of the duplicate entries was either obtained by the Agency directly from the Applicant or they would be aware of the information already.
36. I have reviewed the remaining information exempted from release by the Agency. I consider it is sensitive in nature and was provided by third parties to the Agency with the expectation it would be kept confidential.
37. In these circumstances, I am satisfied the ability of the Agency, which is a public hospital, to obtain similar information in the future would be significantly impacted by disclosure if third parties were aware information of this nature may be routinely disclosed under FOI.
38. Accordingly, I am satisfied disclosure of the relevant information would be contrary to the public interest for the purposes of section 35(1)(b) and is exempt under section 35(1)(b).<sup>22</sup>
39. The Schedule of Documents in **Annexure 1** outlines my decision in relation to section 35(1)(b).

***Section 25 – Deletion of exempt or irrelevant information***

40. 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.
41. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'<sup>23</sup> 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.<sup>24</sup>
42. I have considered the effect of deleting exempt information from the document. In my view, it is practicable to do so as it would not require substantial time and effort, and the edited document would retain meaning.

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<sup>21</sup> *Ryder v Booth* [1985] VR 869 at 872

<sup>22</sup> *Melbourne Health v OoZ (Review and Regulation)* [2021] VCAT 623 (11 June 2021).

<sup>23</sup> *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].

<sup>24</sup> *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].

## Conclusion

43. On the information before me, I am satisfied certain information in the document is exempt under sections 33(1) and 35(1)(b).
44. 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, I have granted access to the document in part.
45. The Schedule of Documents in **Annexure 1** sets out my decision in relation to the document.

## Review rights

46. 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.<sup>25</sup>
47. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.<sup>26</sup>
48. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.<sup>27</sup>
49. Information about how to apply to VCAT is available online at [www.vcat.vic.gov.au](http://www.vcat.vic.gov.au). Alternatively, VCAT may be contacted by email at [admin@vcat.vic.gov.au](mailto:admin@vcat.vic.gov.au) or by telephone on 1300 018 228.
50. 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.<sup>28</sup>

## Third party review rights

51. As I have determined to release information the Agency exempted from release under sections 33(1) and 35(1)(b), if practicable, I must notify the relevant persons of their right to seek review by VCAT of my decision within 60 days from the date they are given notice.<sup>29</sup>
52. In considering the meaning of 'practicable' in relation to other sections of the FOI Act, VCAT has stated the following:

The use of the word 'practicable' in the legislation to my mind connotes a legislative intention to apply common sense principles. 'Practicable' is not a term of art or a term of precise meaning.

.... The use of the word indicates there should be imported into the process the exercise of judgment by the agency concerned. It does not allow for the conclusion that because a task is possible, it must, ergo, be undertaken.<sup>30</sup>

53. Where the information has been previously released in other parts of a document, I am satisfied it is not practicable to notify the relevant third parties of their review rights.

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<sup>25</sup> The Applicant in section 50(1)(b) and the Agency in section 50(3D).

<sup>26</sup> Section 52(5).

<sup>27</sup> Section 52(9).

<sup>28</sup> Sections 50(3F) and 50(3FA).

<sup>29</sup> Sections 49P(5), 50(3), 50(3AB) and 52(3).

<sup>30</sup> *Re Schubert and Department of Premier and Cabinet* (2001) 19 VAR 35 at [45].



***When this decision takes effect***

54. My decision does not take effect until the Agency's 14 day review period expires.
55. 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.	Various	Acute Notes	Unknown	Released in full	Not subject to review	
2.	Various	Mental Health Notes	8	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 exempt information, as recorded in the marked-up version of the document provided to the Agency with this decision, which is to be deleted in accordance with section 25.	<p><b>Section 33(1):</b> The document contains the personal affairs information of third parties. I am satisfied its disclosure would be unreasonable and is exempt from release under section 33(1) for the reasons outlined in the Notice of Decision above.</p> <p><b>Section 35(1)(b):</b> I am satisfied the document contains information communicated in confidence to the Agency by third parties. Where I am satisfied disclosure of this information would impair the Agency’s ability to obtain similar information in the future, I am satisfied its disclosure would be contrary to the public interest and it is exempt from release under section 35(1)(b) for the reasons outlined in the Notice of Decision above.</p> <p><b>Section 25:</b> 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>