

## Notice of Decision and Reasons for Decision

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Applicant:	'EM4'
Agency:	Northern Health
Decision date:	27 May 2022
Exemptions and provisions considered:	Sections 30(1), 33(1), 35(1)(b) and 25
Citation:	'EM4' and Northern Health ( <i>Freedom of Information</i> ) [2022] VICmr 140 (27 May 2022)

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FREEDOM OF INFORMATION – hospital documents – internal working document – information communicated in confidence – personal affairs information – release not unreasonable – contrary to public interest to release – disclosure would impair agency's ability to obtain similar information in the future

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 further information can be released in the document.

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

I am not satisfied information in the document is exempt under section 35(1)(b).

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

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

A marked-up copy of the document showing information that I am satisfied is exempt has been provided to the Agency with this decision.

My reasons for decision follow.

**Sven Bluemmel**  
Information Commissioner

27 May 2022

## Reasons for Decision

### Background to review

1. The Applicant made a request to the Agency for access to their full health record, including the discharge summary, audio tapes and incident reports from nurses related to an incident on [date].
2. The Agency identified two documents falling within the terms of the Applicant's request and decided to grant access to one document in full and refuse access to another document in full.
3. The Agency relied on the exemptions under sections 30(1), 33(1) and 35(1)(b) to refuse access to the document.
4. The Agency's decision letter sets out the reasons for its decision.

### Review application

5. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
6. I have examined a copy of the document subject to review.
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 its submission, the Agency clarified the exemption under section 33(1) was applied to the names and details of staff members, 35(1)(b) to information provided as part of the investigation, and section 30(1) to the document in full due to the nature of the document.
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.
12. 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.

### Applicant's concerns regarding adequacy of search and missing documents concerns

13. Alongside their review application, the Applicant raised concerns regarding the Agency's document search, given that the Agency had not located audio recordings.
14. In accordance with section 61B(3), I have determined to address these concerns as part of my review.
15. OVIC made enquiries with the Agency regarding the Applicant's concerns and provided a reasonable explanation why the requested recordings were not located.

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

16. Having reviewed the Agency's response, I am satisfied they are not able to provide the recordings as no such recordings exist.

### **Review of exemptions**

17. I will first consider the application of section 35(1)(b) to the document, followed by section 33(1) and section 30(1).

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

18. 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 divulge information or matter communicated in confidence by or on behalf of a person or a government to the Agency?*

19. Whether information communicated by an individual to an agency was communicated in confidence is a question of fact.<sup>2</sup>
20. When determining whether information was communicated in confidence, it is necessary to consider the position from the perspective of the communicator, noting confidentiality can be express or implied from the circumstances of a matter.<sup>3</sup>
21. Generally, section 35(1)(b) only applies to information communicated to an agency from an outside source, rather than from an officer within an agency. However, the Victorian Civil and Administrative Tribunal (**VCAT**) has accepted in certain circumstances, that section 35(1)(b) may apply to confidential information communicated to an agency by its own officers.<sup>4</sup>
22. Having considered the content and context of the documents, I am not satisfied information which was communicated by the Agency officers was communicated in confidence, as it falls within the regular duties of the Agency officers to record incidents occurring in hospital. Further, on the information before me, I consider the Agency has already disclosed most of the information in the document to the Applicant verbally.
23. Where the information in the document directly paraphrases information obtained from a third party who is not an Agency officer, I am satisfied the information was communicated to the Agency in confidence.

*Would disclosure of the information 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?*

24. Section 35(1)(b) also requires consideration of whether the Agency would be impaired from obtaining similar information in the future if the document were to be disclosed under the FOI Act.

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<sup>2</sup> *Ryder v Booth* [1985] VR 869 at [883]; *XYZ v Victoria Police* [2010] VCAT 255 at [264].

<sup>3</sup> *XYZ v Victoria Police* [2010] VCAT 255 at [265].

<sup>4</sup> *Sportsbet v Department of Justice* [2010] VCAT 8 at [71]-[78]; *XYZ v Victoria Police* [2010] VCAT 255 at [287]-[288]; *Birnbaauer v Inner and Eastern Health Care Network* (1999) 16 VAR 9 at [15].

25. This means I must be satisfied others in the position of the communicator would be reasonably likely not to provide similar information to the Agency in the future if the information were to be disclosed.
26. The exemption under section 35(1)(b) will not be made out if the evidence goes no further than the people involved would be somewhat less candid than they otherwise might be in providing information in the future.<sup>5</sup>
27. The public interest test in section 35(1)(b) is narrow, in that it is directed toward the impact release would have on an agency's ability to obtain the same type of information in the future. The exemption does not permit me to have regard to other matters, such as any public interest in favour of release, or the extent to which the Applicant's personal interest in the document would be served by granting access to the document.
28. Although the document summarises information obtained from a third party in relation to an alleged incident, the information is general in nature and, on the face of the document, it appears it has already been communicated to the Applicant. As such, I do not consider disclosure of this information would inhibit the Agency from obtaining similar information in the future. Accordingly, I am not satisfied disclosure would be contrary to the public interest.
29. Accordingly, I am not satisfied that information in the document is exempt under section 35(1)(b). I note I have considered this information in relation to section 33(1) below.
30. The Schedule of Documents in **Annexure 1** sets out my decision on section 35(1)(b).

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

31. 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.

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

32. 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.<sup>6</sup>
33. I also note 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>7</sup>
34. The Agency does not seek to rely on this exemption in relation to the Applicant's own information. I am satisfied there is certain information in the documents where the only party to whom the information relates is the Applicant.
35. I am satisfied the document contains information that identifies third parties, such as their names and health information. Further, I am satisfied position titles of Agency officers and information in the document which describes the incident and the response to the incident is capable of indirectly

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<sup>5</sup> *Smeaton v Victorian WorkCover Authority* [2012] VCAT 1549 approving *Birnbauer v Inner and Eastern Health Care Network* (1999) 16 VAR 9

<sup>6</sup> Section 33(9).

<sup>7</sup> *Re F and Health Department* (1988) 2 VAR 458 as quoted in *RFJ v Victoria Police FOI Division* [2013] VCAT 1267 at [103].

identifying the third parties involved. I consider information of this nature constitutes '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?*

36. 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.<sup>8</sup>
37. 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'.<sup>9</sup>
38. 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.<sup>10</sup>
39. 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:<sup>11</sup>

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

The information was recorded by Agency officers following an incident involving the Applicant and another patient. Following the incident, certain activities were undertaken as follow up. I consider the circumstances of the matter are sensitive.

Where the information describes events involving the third party, I consider it is more sensitive in nature. Where the information records administration matters or a conversation between Agency officers and the Applicant, I consider it is less sensitive.

The documents contain the names of Agency officers who were involved in the Agency's response to the incident. I consider the document concerns these individuals in their professional roles, rather than in a personal or private capacity. However, having considered the particular circumstances of this matter, including the sensitive context and purpose of the document, I accept the names of Agency officers is sensitive information. However, I do not consider their position titles are sensitive.

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

The Applicant seeks access to a copy of the document for use in a court proceeding concerning the incident. Disclosure of the document will assist them in confirming the information recorded by the Agency officers in relation to the incident.

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

Transparency in relation to the Agency's response to the incident is a matter of public interest, particularly where allegations of assault are raised.

Noting there are legal proceedings related to the incident, I also consider there is public interest in the disclosure of information held by the Agency to the subject of those proceedings in certain circumstances. However, there are procedures in place outside FOI which require the disclosure of material to the parties following an allegation of assault.

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<sup>8</sup> *Re Page v Metropolitan Transit Authority* (1988) 2 VAR 243 at 245-6.

<sup>9</sup> [2008] VSCA 218 at [104].

<sup>10</sup> *Coulson v Department of Premier and Cabinet (Review and Regulation)* [2018] VCAT 229.

<sup>11</sup> *Ibid.*

In relation to release of the information under the FOI Act, I must consider how the release of the information could impact the personal privacy of third parties. In the sensitive circumstances of this matter, I consider release of information which identifies or describes events related to a third party receiving care would compromise their expectation of privacy and confidentiality, which is a countervailing public interest.

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

There is no information before me in relation to the views of the third parties. Given the sensitive circumstances of this matter, I am of the view the third parties would likely object to the disclosure of their personal affairs information to the Applicant.

- (e) The likelihood of further disclosure of the 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>12</sup>

Accordingly, I have considered the likelihood of the personal affairs information in the document being further disseminated, if disclosed, and the effects that 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 to assess its content and for use in a legal proceeding relating to the incident.

While there is no evidence before me to suggest that further disclosure is intended, given the sensitive nature of the document, I must consider the potential effects of further disclosure.

- (f) The likelihood disclosure would cause distress or anxiety to individuals it relates to

Given the circumstances of this matter, I am satisfied disclosure of the personal affairs information could cause distress to some of the third parties.

- (g) Whether disclosure of the information or would be reasonably likely to endanger the life or physical safety of any person<sup>13</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>14</sup>

On the information before me, I am satisfied this is a relevant factor in this matter.

40. Having considered the above factors, I am satisfied disclosure of names of Agency officers and information describing events involving a third-party patient of the Agency would be unreasonable in the circumstances.
41. However, I am not satisfied it would be unreasonable to disclose the position titles of Agency officers as they are titles which could apply to multiple third parties involved in the incident.
42. I am not satisfied it would be unreasonable to release records of the Agency's interactions with the Applicant or administrative matters connected to the incident, where they do not disclose to the

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<sup>12</sup> *Victoria Police v Marke* [2008] VSCA 218 at [68].

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

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

personal affairs information of a third party patient.

43. Accordingly, I am satisfied certain personal affairs information in the documents is exempt from release under section 33(1).
44. The Schedule of Documents in **Annexure 1** sets out my decision on section 33(1).

**Section 30(1) – Internal working documents**

45. I have considered the application of section 30(1) to information I have not already found to be exempt under section 33(1).
46. 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.
47. The exemption does not apply to purely factual information in a document.<sup>15</sup>

*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?*

48. 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.<sup>16</sup>
49. The Agency submits that staff enter an incident into a program called Riskman for quality review. Details of an incident are recorded by staff based on their knowledge and interpretation of what had occurred.
50. Having considered the content and context of the document, I am satisfied certain information in the document contains Agency officers' subjective views and assessments of the incident. I consider this information constitutes matter in the nature of opinion.
51. However, I am not satisfied other information in the document, including the details of the incident, administrative tasks and the titles of the reports constitute opinion, advice or recommendations, or consultation or deliberation between Agency officers. Rather it is factual information, being either a description of the events that occurred or actions taken by the Agency following the incident. Accordingly, this information is not exempt under section 30(1) as it does not meet the first limb of section 30(1).

*Was the information communicated in the course of the Agency's deliberative processes?*

52. 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.<sup>17</sup>

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<sup>15</sup> Section 30(3).

<sup>16</sup> *Mildenhall v Department of Education* (1998) 14 VAR 87.

<sup>17</sup> *Brog v Department of Premier and Cabinet* (1989) 3 VAR 201 at 208.

53. In *Re Waterford and Department of Treasury (No.2)*,<sup>18</sup> 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.

54. I am satisfied the information was provided in the course of the Agency’s deliberative processes in relation to its incident response.

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

55. 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:<sup>19</sup>

- (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 document and the broader context giving rise to the creation of the document;
- (c) the stage of a decision or status of policy development or a process being undertaken at the time the communication was made;
- (d) whether disclosure of the document 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 document 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 document;
- (f) the impact of disclosing document 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
- (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.

56. The Agency submits disclosure of the document would impair its recording of incidents, as staff would not feel comfortable in providing their recollection of events.

57. I am not satisfied disclosure under the FOI act would discourage the Agency officers from recording similar information in future, given the recording of incidents is a professional obligation in a healthcare context. However, I acknowledge the sensitivity of the incident and the discomfort that Agency officers may experience in the course of responding to incidents of this nature.

58. In the circumstances of this matter, given certain information has already been verbally communicated to the Applicant, I do not consider disclosure under the same information under the FOI Act would

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<sup>18</sup> [1984] AATA 67; (1984) 5 ALD 588; 1 AAR 1 at [58].

<sup>19</sup> *Hulls v Victorian Casino and Gambling Authority* (1998) 12 VAR 483.



negatively impact the recording of incidents in the future.

59. There is a small amount of information in the document which was recorded by the Agency for the purposes of internal review of its response to the incident. In this instance, I consider there is public interest in maintaining the ability of Agency officers to record and review its response to an incident in a fulsome manner. If it were unable to do so, the implications of such an outcome could undermine the robustness of the Agency's review into these types of incidents and the ability to identify areas for improvement.
60. It is essential for the public to have confidence that when an incident 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.<sup>20</sup>
61. Accordingly, I am satisfied disclosure of this information would be contrary to the public interest and it is therefore exempt from release under section 30(1).
62. The Schedule of Documents in **Annexure 1** sets out my decision on the application of section 30(1) to each document.

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

63. 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.
64. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'<sup>21</sup> and the effectiveness of the deletions. Where deletions would render the document meaningless, they are not 'practicable', and release of the document is not required under section 25.<sup>22</sup>
65. I note the Agency's submission that deletion of exempt information would render the document meaningless as to do so would leave only the Applicant's contact information in the document.
66. In my view, it is practicable for the Agency to provide the Applicant with an edited copy of the documents with exempt information deleted, because it would not require substantial time and effort, and the edited document would retain meaning.

### **Conclusion**

67. On the information available, I am satisfied information in the document is exempt under sections 30(1) and 33(1). I am not satisfied the exemption in section 35(1)(b) applies.
68. 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.
69. A marked-up copy of the document showing information that I am satisfied is exempt has been provided to the Agency with this decision.

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<sup>20</sup> Section 3.

<sup>21</sup> *Mickelborough v Victoria Police (General)* [2009] VCAT 2786 [31]; *The Herald and Weekly Times Pty Limited v The Office of the Premier (General)* [2012] VCAT 967 at [82].

<sup>22</sup> *Honeywood v Department of Human Services* [2006] VCAT 2048 [26]; *RFJ v Victoria Police FOI Division (Review and Regulation)* [2013] VCAT 1267 at [140], [155].

## **Review rights**

70. If either party to this review is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.<sup>23</sup>
71. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.<sup>24</sup>
72. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.<sup>25</sup>
73. 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.
74. 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>26</sup>

## ***Third party review rights***

75. As I have determined to release documents that contain the personal affairs information of persons other than the Applicant, and information exempted under section 35(1)(b), 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.<sup>27</sup>
76. In the circumstances, I have decided notifying the relevant third parties of their review rights is not practicable as I am of the view for the following reasons:
- (a) notifying the relevant third parties would be an unnecessary intrusion;
  - (b) the nature of the personal affairs information, being the position titles of Agency employees, and information relating predominately to the Applicant; and
  - (c) the personal affairs information, where it relates to Agency officers, was provided in context of their public service profession as opposed to their private lives.
77. In any case, the Agency is at liberty to advise the relevant Agency officers of my decision and their right to seek review by VCAT of my decision to release their personal affairs information or information claimed to have been communicated in confidence.

## ***When this decision takes effect***

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

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<sup>23</sup> The Applicant in section 50(1)(b) and the Agency in section 50(3D).

<sup>24</sup> Section 52(5).

<sup>25</sup> Section 52(9).

<sup>26</sup> Sections 50(3F) and (3FA).

<sup>27</sup> 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.	[date]	Report	4	<p><b>Refused in full</b></p> <p>Sections 30(1), 33(1) and 35(1)(b)</p>	<p><b>Release in part</b></p> <p>Sections 30(1), 33(1), 25</p> <p>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>	<p><b>Section 35(1)(b):</b> I am not satisfied this document is exempt under section 35(1)(b) for the reasons provided in the Notice of Decision, above.</p> <p><b>Section 33(1):</b> I am satisfied the document contains information that is exempt under section 33(1) for the reasons outlined in the Notice of Decision, above.</p> <p><b>Section 30(1):</b> I am satisfied information in this document is exempt under section 30(1) for the reasons provided 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>