

Notice of Decision and Reasons for Decision

Applicant: 'EN5'
Agency: Castlemaine Health
Decision date: 6 June 2022
Exemption considered: Section 33(1)
Citation: 'EN5' and Castlemaine Health (*Freedom of Information*) [2022] VICmr 150 (6 June 2022)

FREEDOM OF INFORMATION – medical records – mental health records – client note – documents affecting personal privacy of other parties – personal affairs information – unreasonable disclosure of information – section 33(2AB)

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 Applicants' request is the same as the Agency's decision in that I am satisfied the personal affairs information in the documents is exempt from release under section 33(1).

Where I am satisfied it is practicable to provide the Applicants with an edited copy of the documents with exempt information deleted in accordance with section 25, access is provided in part. Where I am satisfied it is not practicable to do so, access is refused in full.

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

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner

6 June 2022

Reasons for Decision

Background to review

1. The Applicants made a request to the Agency seeking access to certain documents.
2. Following consultation with the Agency, the Applicants clarified the terms of their request and sought access to Community Health documents in relation to a family member.
3. The Agency identified five documents falling within the terms of the Applicants' request and refused access to four documents in part and one document in full under section 33(1). The Agency's decision letter sets out the reasons for its decision.

Review application

4. The Applicants sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
5. I have examined a copy of the documents subject to review.
6. The Applicants and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
7. I have considered all communications and submissions received from the parties.
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 exemption

Section 33(1) – Documents affecting personal privacy 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 other than the Applicant (a **third party**);¹ and
 - (b) such disclosure would be 'unreasonable'.

Do the documents contain personal affairs information of a third party?

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 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

¹ Sections 33(1) and (2).

² Section 33(9).

unconditional, this is to be interpreted by reference to the capacity of any member of the public to identify a third party.³

13. The documents are the medical records of a third party. I am satisfied they contain information concerning the personal affairs of third parties. While the documents also contain information regarding the Applicants, I consider it is intertwined with that of the third parties.

Would disclosure of the personal affairs information be unreasonable?

14. The concept of 'unreasonable disclosure' involves balancing 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.
15. In *Victoria Police v Marke*,⁴ 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'.⁵ The Court further held, '[t]he protection of privacy, which lies at the heart of [section] 33(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
16. In determining whether disclosure of the personal affairs information would be unreasonable in the circumstances, I have considered the following factors:

(c) The nature of the personal affairs information

The documents are medical records relating to a third party. The personal affairs information is sensitive and personal in nature.

(d) The circumstances in which the information was obtained

The information was obtained by the Agency in the course of providing medical treatment to a third party.

The Agency obtains sensitive and personal information from and in relation to patients in its care. Ensuring confidentiality of the information provided as part of a person's medical treatment can be fundamental to providing effective and efficient medical care.

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

(e) The Applicants' 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 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 under section 33(1).⁷

³ *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].

⁴ [2008] VSCA 218 at [76].

⁵ *Ibid.*

⁶ *Ibid* at [79].

⁷ *Ibid* at [104].

The Applicants seek the information in relation to a privacy complaint made about an Agency medical officer in relation to medical treatment provided to their family member.

While I recognise the importance of the information for the Applicants, there is no information before me which is likely to assist the Applicants in their stated purpose.

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

While I acknowledge the Applicants' personal interest in seeking access to the information, I consider there is a strong public interest in the personal and sensitive health information of individuals remaining confidential which outweighs the Applicants' personal interest in the information.

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

The nature of disclosure under the FOI Act is unconditional and unrestricted, which means an applicant is free to disseminate widely or use a document as they choose once it is released.⁸

There is nothing before me to suggest the information would be more widely disclosed if released to the Applicants.

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

In deciding whether disclosure of a document would involve the unreasonable disclosure of a third party's personal affairs information, an agency must notify that person (or their next of kin, if deceased) an FOI request has been received for documents containing their personal information and seek their view as to whether disclosure of the document should occur.⁹ 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.¹⁰

The Agency consulted with the third party whose medical records are the subject of this request. The third party advised they consent to release of their personal affairs information to the Applicants. Information which is limited to this third party was provided to the Applicants in the Agency's partial release of the documents.

While the Applicants' family member may have provided permission for release of the documents, this factor alone is not determinative.

I note the documents closely relate to matters concerning not only the Applicants but additional third parties, such that their personal affairs information is intertwined with another third party's personal affairs information.

⁸ Ibid at [68].

⁹ Section 33(2B).

¹⁰ Section 33(2C).

The Agency did not undertake consultation with other third parties due to the sensitive nature of the information.

- (i) Whether disclosure of the information would or would be reasonably likely to endanger the life or physical safety of any person¹¹

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.¹² I am satisfied this is a relevant factor to consider in this matter.

- (j) Whether the disclosure would increase the risk to a primary person's safety from family violence¹³

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
- (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 relevant documents would increase the risk to the safety of a 'primary person'¹⁴ from family violence.

In the circumstances, I accept that the Agency is best placed to make an informed assessment of this factor. I recognise the Agency has engaged directly with the Applicants in relation to its concerns. While I also note that the Applicants disagree, I accept that this is a relevant factor in this matter.

17. Having weighed the above factors, on balance, I am satisfied disclosure of personal affairs information in the documents would be unreasonable. Further, I am satisfied where the information relates to the Applicants, but also relates to a third party, that it is not practicable to edit this information further than has already been undertaken by the Agency in its decision.
18. The information identified by the Agency in its decision is therefore exempt under section 33(1).
19. My decision in relation to section 33(1) is set out in the Schedule of Documents in **Annexure 1**.

Section 25 – Deletion of exempt or irrelevant information

20. 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.

¹¹ Section 33(2A).

¹² Section 33(2A).

¹³ Section 33(2AB).

¹⁴ 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 that 'a person is a *primary person* if an information sharing entity reasonably believes that the person may be subjected to family violence'.

21. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'¹⁵ 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 25.¹⁶
22. I have considered the effect of deleting exempt information from the documents. In my view, it is practicable for the Agency to delete the exempt information in four of the documents, because deleting the exempt information would not render the documents meaningless.
23. Where deletions would render a document meaningless, as with Document 5, they are not practicable, and release of this document is not required under section 25.¹⁷
24. My decision in relation to section 25 is set out in the Schedule of Documents in **Annexure 1**.

Conclusion

25. On the information before me, I am satisfied the exemption in section 33(1) applies to the information in the documents.
26. Where I am satisfied it is practicable to provide the Applicants with an edited copy of the documents with exempt information deleted in accordance with section 25, access is provided in part. Where I am satisfied it is not practicable to do so, access is refused in full.
27. The Schedule of Documents in **Annexure 1** sets out my decision in relation to each document.

Review rights

28. If either party to this review is not satisfied with my decision, they are entitled to apply to the Victorian Civil and Administrative Tribunal (**VCAT**) for it to be reviewed.¹⁸
29. The Applicants may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹⁹
30. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.²⁰
31. 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.
32. The Agency is required to notify the Information Commissioner in writing as soon as practicable if either party applies to VCAT for a review of my decision.²¹
33. 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.

¹⁵ *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].

¹⁶ *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] at [155].

¹⁷ *Ibid.*

¹⁸ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

¹⁹ Section 52(5).

²⁰ Section 52(9).

²¹ Sections 50(3F) and 50(3FA).

Document No.	Date of Document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
1.	[date]	Client progress note	1	Released in part Sections 33(1), 25	Release in part Sections 33(1), 25	<p>Section 33(1): I am satisfied it would be unreasonable to disclose the personal affairs information in this document for the reasons outlined in the Notice of Decision, above.</p> <p>Section 25: I am satisfied it is practicable to provide the Applicants with an edited copy of this document with exempt information deleted in accordance with section 25.</p>
2.	[date]	Client progress note	1	Released in part Sections 33(1), 25	Release in part Sections 33(1), 25	<p>Section 33(1): See comments for Document 1 above.</p> <p>Section 25: See comments for Document 1 above.</p>
3.	[date]	Client progress note	1	Released in part Sections 33(1), 25	Release in part Sections 33(1), 25	<p>Section 33(1): See comments for Document 1 above.</p> <p>Section 25: See comments for Document 1 above.</p>
4.	[date]	Client progress note	1	Released in part Sections 33(1), 25	Release in part Sections 33(1), 25	<p>Section 33(1): See comments for Document 1 above.</p> <p>Section 25: See comments for Document 1 above.</p>
5.	[date]	Client assessment form	1	Refused in full Sections 33(1), 25	Refuse in full Sections 33(1), 25	<p>Section 33(1): See comments for Document 1 above.</p> <p>Section 25: I am not satisfied it is practicable to provide the Applicants with an edited copy of the document with exempt information deleted, as to do so would render the document meaningless. Accordingly, this document is exempt in full.</p>