

Notice of Decision and Reasons for Decision

Applicant: 'EQ8'
Agency: Grampians Health
Decision date: 28 June 2022
Exemption considered: Section 33(1)
Citation: 'EQ8' and Grampians Health (Freedom of Information) [2022]
VICmr 180 (28 June 2022)

FREEDOM OF INFORMATION – CCTV footage – personal affairs information – disclosure unreasonable

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 the documents are exempt from release under section 33(1).

As I am satisfied it is not practicable to provide the Applicant with an edited copy of the documents with irrelevant and exempt information deleted in accordance with section 25, access to the documents 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

28 June 2022

Reasons for Decision

Background to review

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

Video footage of [location] on [date] at [time] and copy of notes from DR Review on [date] between [Names of third parties]
2. The Agency identified three documents falling within the terms of the Applicant's request and provided access to one document outside the FOI Act and refused access to two documents in full under section 33(1). 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 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) – Documents affecting personal privacy of a third party

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 a third party?

10. Information relating to a third party'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

¹ Sections 33(1) and 33(2).

² Section 33(9).

11. A document will disclose a third party's personal affairs information if it is capable, either directly or indirectly, of identifying that person. Given that the FOI Act does not place any restrictions on an applicant's use or dissemination of documents obtained under FOI, this is to be interpreted by reference to the capacity of any member of the public to identify a third party.³
12. The two documents subject to review contain CCTV footage. The CCTV footage contains images of the Applicant's [family member] and Agency staff. The quality of the footage is clear and I consider that, at various times and to varying degrees, the individuals whose images appear in the footage are capable of being identified.
13. Although certain Agency officers in the footage are wearing masks over their faces, I am of the view that those officers could be identified by the Applicant or others who were present or have knowledge of the incident.
14. Therefore, I am satisfied the CCTV footage contains the personal affairs information of third parties for the purposes of section 33(1).

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

15. The concept of 'unreasonable disclosure' involves balancing the public interest in the disclosure of official information with the interest in protecting an individual's right to personal privacy in the circumstances.
16. 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.⁴
17. 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'.⁵
18. In determining whether disclosure of the personal affairs information of third parties 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 the information was obtained by the Agency

Having viewed the footage as a whole, I am satisfied it is sensitive in nature.

The footage is recorded in the context of a hospital treatment setting and involves the Applicant's [family member] and Agency staff.

The Victorian Civil and Administrative Tribunal (**VCAT**) decisions has held there is nothing particularly sensitive about matters occurring or arising in the course of one's official duties and disclosure of this type of information is generally considered not unreasonable.⁶ While I consider the actions of Agency staff captured in the footage depict them carrying out their professional duties, I do not consider the context in which they are captured represents them undertaking their usual or ordinary duties such that disclosure of their personal affairs information would be reasonable.

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

⁵ *Victoria Police v Marke* [2008] VSCA 218 at [104].

⁶ See Deputy President Macnamara's comments in *Milthorpe v Mt Alexander Shire Council* [1996] VCAT 368.

(b) The Applicant's interest in the information

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.⁷

The Applicant seeks access to the footage to determine whether their [family member] was given appropriate care during an incident where they were physically restrained by Agency staff.

While I acknowledge the reasons for the Applicant's request, I must consider a range of factors in my decision, including the privacy of the other individuals captured on the CCTV footage.

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

Whilst I acknowledge the public interest in transparency and accountability in relation to the treatment and care of patients within the health care system and public hospitals, I consider the Applicant's interest in obtaining access to the document is private in nature.

In the event the Applicant seeks to make a complaint in relation to the health care services provided or to complain about any alleged misconduct by a registered health practitioner, there are avenues available to make a complaint and it is not necessary to obtain access to the requested documents in order to do so.⁸ The relevant agencies have statutory powers to obtain access to relevant information as part of making preliminary inquiries or investigating a complaint.

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

I do not have specific information before me as to the views of the third parties as the Agency determined it would not be practicable to undertake third party consultation.

Given the nature of the CCTV footage and the sensitivity of the incident, I am satisfied the relevant individuals, whose images appear in the footage, would be reasonably likely to object to its release.

(e) The likelihood of further disclosure of information, if released

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

I have considered the likelihood of the documents being further disseminated by the Applicant, and the effects such disclosure would have on the privacy of the third parties given the nature of the documents and their content.

⁷ *Victoria Police v Marke* [2008] VSCA 218 at [104].

⁸ Refer to the Health Complaints Commissioner at <https://hcc.vic.gov.au>, the Mental Health Complaints Commissioner at <https://www.mhcc.vic.gov.au/> and the Australian Health Practitioner Regulation Agency at <https://www.ahpra.gov.au/>.

While there is no information before me to suggest that the personal affairs information would be further distributed, I acknowledge that the privacy of third parties may be affected following the disclosure of the footage.

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

I must also consider whether disclosure of the personal affairs information would or would be reasonably likely to endanger the life or physical safety of any person.⁹ The term 'any person' is broad and extends to any relevant endangerment involving the safety of an applicant, a related third party or any other person. However, I do not consider this is a relevant factor in this matter.

19. Having considered the above factors, on balance, I am satisfied disclosure of the personal affairs information in the documents would be unreasonable and is exempt from release under section 33(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.
21. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'¹⁰ 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 25.¹¹
22. I have considered the effect of deleting exempt information from the documents, including whether the Agency could crop, pixelate or blur the footage to remove the personal affairs information of the Agency officers. I am satisfied it is not practicable for the Agency to edit the footage given the number of individuals captured, the significant amount of movement of those individuals, the degree of pixilation required to render the individuals non-identifiable and the length of the footage.

Conclusion

23. On the information before me, I am satisfied the documents are exempt from release under section 33(1).
24. As I am satisfied it is not practicable to provide the Applicant with an edited copy of the documents with exempt information deleted in accordance with section 25, access to the documents is refused in full.

Review rights

25. If either party to this review is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.¹²

⁹ Section 33(2A).

¹⁰ *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].

¹¹ *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].

¹² The Applicant in section 50(1)(b) and the Agency in section 50(3D).

26. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹³
27. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹⁴
28. 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.
29. 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.¹⁵

¹³ Section 52(5).

¹⁴ Section 52(9).

¹⁵ Sections 50(3F) and 50(3FA).