

Notice of Decision and Reasons for Decision

Applicant:	'EW2'
Agency:	The Royal Victorian Eye and Ear Hospital
Decision date:	21 October 2022
Exemptions considered:	Sections 30(1), 33(1)
Citation:	'EW2' and <i>The Royal Victorian Eye and Ear Hospital</i> (Freedom of Information) [2022] VICmr 230 (21 October 2022)

FREEDOM OF INFORMATION – Executive Committee Paper – audits – patient complaints – draft documents – patient health information – third party health information – recommendations

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.

I am satisfied information in the document is exempt from release under sections 30(1) and 33(1). However, my decision on the Applicant's request differs the Agency's decision in that I have decided to release additional information where I am satisfied it is not exempt from release.

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 to the document is granted in part.

The Schedule of Documents in **Annexure 1** sets out my decision.

The document is to be released to the Applicant in accordance with the marked up version provided to the Agency with this decision.

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner
21 October 2022

Reasons for Decision

Background to review

1. The Applicant's freedom of information request follows a cancellation of a surgical operation on the intended day of surgery.
2. The Applicant made a request to the Agency seeking access to a report relating to the Applicant that was referred to in an email by an Agency Consumer Liaison Officer.
3. The Agency identified one document falling within the terms of the Applicant's request and refused access to the document in full under section 30(1). The Agency's decision letter sets out the reasons for its decision.

Review application

4. The Applicant 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 document subject to review.
6. The Applicant 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.
10. 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'.¹ 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 30(1) – Internal working documents

11. 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

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

(c) disclosure of the matter would be contrary to the public interest.

12. The exemption does not apply to purely factual material in a document.²

Does the document 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?

13. The term 'officer of an Agency' is defined in section 5(1). It includes a member of an agency, a member of an agency's staff, and any person employed by or engaged on behalf of an agency, regardless of whether they are subject to the *Public Administration Act 2004* (Vic).

14. To meet the requirements of section 30(1), a document must contain matter in the nature of opinion, advice or recommendation prepared by an agency officer, or consultation or deliberation between agency officers.

15. It is not necessary for a document to be in the nature of opinion, advice or recommendation. Rather, the issue is whether release of the document would disclose matter of that nature.³

16. The document is titled *Executive Committee Paper for Information* and concerns an audit into surgery cancellations on the day of the Applicant's appointment. It contains background information, the outcome of an audit and recommendations. As such, I am satisfied it contains matter in the nature of opinion, advice and recommendations.

17. It is clear on the face of the document that it is a draft. It includes tracked comments by Agency officers. Accordingly, I am satisfied the information meets the requirements of section 30(1)(a).

18. The document also contains some factual information in the 'background' section of the document. The entirety of Appendix A is factual information about patients. Such information is not exempt from release under section 30(1) given the application of section 30(3).

Was the document 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?

19. The term 'deliberative process' is interpreted broadly and includes any of the processes of deliberation or consideration involved in the functions of an agency, Minister or government.⁴

20. In *Re Waterford and Department of Treasury (No.2)*,⁵ the 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.

21. I am satisfied the document was made in the course, and for the purpose of, the Agency's deliberative processes in reviewing its operating environment, specifically, reviewing day-of-surgery cancellations and surgical waitlists.

² Section 30(3).

³ *Mildenhall v Department of Education* (1998) 14 VAR 87.

⁴ *Brog v Department of Premier and Cabinet* (1989) 3 VAR 201 at 208.

⁵ [1984] AATA 67; (1984) 5 ALD 588; 1 AAR 1 at [58].

Would disclosure of the document be contrary to the public interest?

22. In determining if release of a document would be contrary to the public interest, it is necessary to 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:⁶
- (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 documents and the broader context giving rise to the creation of the documents;
 - (c) the stage of a decision or status of policy development or a process being undertaken at the time the communications were made;
 - (d) whether disclosure of the documents 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 documents 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 documents;
 - (f) the impact of disclosing documents 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.
23. The Agency submits disclosure of the document would be contrary to the public interest for the following reasons:
- (a) the document is a draft and no further versions of the document were located;
 - (b) the document was prepared and used for the purpose of internal deliberation and consultation between Agency officers;
 - (c) disclosure would interfere with the giving of full and frank confidential advice and prejudice the efficient running of the Agency's investigative process;
 - (d) the data that appears in the background of the paper has not been verified and could therefore be misleading if released; and
 - (e) the draft view expressed in the document is not representative of a final view or actions agreed to by the Executive team.
24. I consider there are factors both in favour of release and against release of the document.
25. The document records the early stages of the Agency's consideration of surgical waitlist times and same day cancellations of surgery and is clearly a draft document.

⁶ *Hulls v Victorian Casino and Gambling Authority* (1998) 12 VAR 483 at [488].

26. I do not accept draft documents will, in all cases, be exempt on grounds it would be contrary to the public interest to disclose such documents. Such an interpretation is not consistent with the object and purpose of the FOI Act. The circumstances and content of each document must be considered on a case-by-case basis.
27. In the circumstances of this matter, I do not consider disclosure of the Agency's deliberation would be reasonably likely to inhibit similar documents being created or undermine or diminish robust deliberations between Agency officers in the future. In my view, it is likely Agency officers will continue to consult with one another, deliberate, and record their deliberations on matters of importance, such as this.
28. The document also contains the outcome of an audit and recommendations arising from the audit. In *Smeaton v Victorian WorkCover Authority*,⁷ the Victorian Civil and Administrative Tribunal (VCAT) considered several previous decisions concerning audits and observed:

... the general thrust of the AAT's and VCAT's decisions is clear. Releasing documents concerning the audit process is contrary to the public interest. I agree with the ...observations of the AAT and VCAT about the public interest in protecting the integrity of the audit process, including where appropriate (as I see as the case here) protecting the confidentiality of the process.⁸
29. However, like draft documents, audit documents are also not exempt as a class and I must carefully consider this particular document subject to review, including its purpose, the context surrounding its creation, and its contents.
30. I acknowledge the Applicant's interest in obtaining access to the document and the right of every person to seek access to documents under the FOI Act.
31. There is a public interest in transparency and accountability with respect to surgical waiting lists and same day surgical cancellations. Surgery waitlist times and same day cancellations are major issues for the public health system and have a significant impact on the community. The Victorian Agency for Health Information publishes data on statewide elective surgery waiting lists, including data specifically relating to the Agency.⁹ It is clear from this data the waiting times for elective surgeries are significant in Victoria.
32. It is essential for the public to have confidence that when there are matters impacting the public health system, such matters will be thoroughly investigated, and any appropriate measures identified and put in place to remove or mitigate the issue.
33. However, this public interest must be balanced with the public interest in agencies being able to undertake a thorough and considered approach in their internal deliberation processes. Likewise, it is important that Agency officers can openly consult and discuss such matters.
34. I have placed weight on the fact that this document was created early in the deliberative process and was prepared to assist the eventual decision making processes regarding the management of same day surgical cancellations and patient waiting times. Having considered the draft nature of the document and the purpose of the document's creation, it is clear the document does not reflect a final decision by the Agency or fully reflect its deliberation or any actions of decisions of the Agency with respect to patient waiting times and cancellation of surgeries.

⁷ (General) [2011] VCAT 1234.

⁸ *Smeaton v Victorian Workcover Authority (General)* [2011] VCAT 1234 at [37].

⁹ Victorian Agency for Health Information, *Patients waiting for treatment*, <https://vahi.vic.gov.au/elective-surgery/patients-waiting-treatment>.

35. While I do not accept the Agency's argument about the veracity of the data, I accept disclosure could misinform the general public given the recommendations may or may not have been acted upon, which would be contrary to the public interest where such information concerns serious public health issues.
36. While I acknowledge the Applicant's view the document should be released in accordance with the framework of open disclosure following adverse events in health services¹⁰ and the *Victorian Charter of Human Rights and Responsibilities Act 2006* (Vic), the document itself does not specifically relate to the Applicant and the cancellation of their surgery.
37. Accordingly, I am satisfied information in the document would be contrary to the public interest to disclose and is exempt from release under section 30(1).
38. However, the factual information in the 'Background' section of the document is not exempt under section 30(1).

Section 33(1) – Documents affecting personal privacy of third parties

39. 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**);¹¹ and
 - (b) such disclosure would be 'unreasonable'.
40. The Agency did not apply the exemption under section 33(1), however, as I am not satisfied Appendix A is exempt from release under section 30(1), section 33(1) is a relevant exemption to consider.
41. During the review, the Applicant was advised section 33(1) would be considered and they were invited to provide a submission in response.
42. In response, the Applicant indicated they are not seeking access to any information about the personal or clinical details of any other patients.
43. Accordingly, I have considered whether Appendix A contains personal affairs information of third parties, and for completeness, whether disclosure of such information would be unreasonable in the circumstances.

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

44. 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 this may be reasonably determined.¹²
45. 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.¹³

¹⁰ Department of Health, *Open Disclosure following adverse events in health services*, <https://www.health.vic.gov.au/quality-safety-service/open-disclosure-following-adverse-events-in-health-services>.

¹¹ Sections 33(1) and 33(2).

¹² Section 33(9).

¹³ *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].

46. Appendix A of the document contains a table setting out an audit of numerous complaints from patients, and includes the surgery type, dates and specific health related information about the patients.
47. The document also includes the name of an author of the document.
48. During this review, OVIC inquired whether any of the details within Appendix A of the document relate to the Applicant. The Agency confirmed that there is no information relating to the Applicant in Appendix A. Accordingly, all of the personal affairs information in the document concerns third parties.
49. I am satisfied this information is 'personal affairs information' for the purposes of the exemption under section 33(1).

Would disclosure of the personal affairs information be unreasonable?

50. The concept of 'unreasonable disclosure' involves balancing the public interest in the disclosure of official information with the personal interest in privacy in the particular circumstances of a matter.
51. In *Victoria Police v Marke*,¹⁴ 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'.¹⁵ 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'.¹⁶
52. 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).¹⁷
53. As 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.¹⁸
54. 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;
 - (b) the circumstances in which the information was obtained;
 - (c) the applicant's interest in the information and whether their purpose for seeking the information is likely to be achieved;
 - (d) whether any public interest would be promoted by release of the personal affairs information

¹⁴ [2008] VSCA 218 at [76].

¹⁵ *Ibid.*

¹⁶ *Ibid* at [79].

¹⁷ *Ibid* at [104].

¹⁸ *Ibid* at [68].

- (e) whether the individuals to whom the information relates object, or would be likely to object, to the release of the information;¹⁹ and
 - (f) whether disclosure of the information would or would be reasonably likely to endanger the life or physical safety of any person.²⁰
55. In the circumstances, I am satisfied disclosure would be unreasonable for the following reasons:
- (a) health information is highly sensitive and personal in nature;
 - (b) the Applicant does not seek access to personal or health information of other patients;
 - (c) the information was obtained by the Agency during the course of providing healthcare services to patients and was collected with an expectation of confidentiality;
 - (d) the third parties would be reasonably likely to object to the release of their sensitive health information under the FOI Act to an unrelated FOI applicant;
 - (e) disclosure of health information to an unrelated person would be reasonably likely to cause the third parties stress and anxiety;
 - (f) disclosure of the name of the Agency officer who prepared the document will not assist the Applicant's understanding of the document and based on the information before me, they are not the sole author of the document; and
 - (g) there is no public interest in disclosure of the information.
56. On balance, I am satisfied the need to protect the sensitive health and personal affairs information of the third parties in this matter outweighs the Applicant's personal interest in obtaining the requested document.
57. Further, disclosure of the name of the author of the document will not assist the Applicant, and on balance, I am satisfied disclosure would be unreasonable.
58. Accordingly, I am satisfied Appendix A and the name of the author of the document is exempt from release under section 33(1).

Section 25 – Deletion of exempt or irrelevant information

59. 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.
60. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'²¹ 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 25.²²
61. I have considered the effect of deleting exempt information from the document. In my view, it is practicable to delete the exempt information as to do so would not require substantial time and effort and the edited document will retain meaning.

¹⁹ Section 33(2B).

²⁰ This is a mandatory consideration under section 33(2A).

²¹ *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].

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

Conclusion

62. On the information before me, I am satisfied information in the document is exempt from release under sections 30(1) and 33(1).
63. 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.
64. The Schedule of Documents in **Annexure 1** sets out my decision.
65. The document is to be released to the Applicant in accordance with the marked up version I have provided to the Agency with this decision.

Review rights

66. If either party to this review is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.²³
67. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.²⁴
68. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.²⁵
69. 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.
70. 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.²⁶

When this decision takes effect

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

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

²⁴ Section 52(5).

²⁵ Section 52(9).

²⁶ Sections 50(3F) and 50(3FA).

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
1.	[date]	Executive Committee Paper for Information	5	Refused in full Section 30(1)	<p>Release in part Sections 30(1), 33(1), 25</p> <p>The document is to be released in accordance with the marked up version of the document provided to the Agency with this decision.</p>	<p>Section 30(1): I am satisfied information in the document is exempt from release under section 30(1). However, I am not satisfied factual information in the 'Background' section or 'Appendix A' is exempt from release under section 30(1) for the reasons provided in the Notice of Decision above.</p> <p>Section 33(1): I am satisfied information in the document is exempt from release under section 33(1) for the reasons provided in the Notice of Decision above.</p> <p>Section 25: 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.</p>