

Notice of Decision and Reasons for Decision

Applicant:	'FA4'
Agency:	Monash Health
Decision date:	3 March 2023
Exemptions considered:	Sections 30(1), 33(1)
Citation:	'FA4' and Monash Health (Freedom of Information) [2023] VICmr 13 (3 March 2023)

FREEDOM OF INFORMATION – incident report – incident in public hospital – patient death – record of incident – incident review – personal affairs information of Agency officers

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 differs from the Agency's decision.

I am satisfied certain information in the documents is exempt from release under sections 30(1) and 33(1). However, I have decided further information is to be released 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 documents with exempt information deleted in accordance with section 25, access to each document 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 documents indicating exempt information in accordance with my decision has been provided to the Agency.

My reasons for decision follow.

Sven Bluemmel
Information Commissioner

3 March 2023

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency seeking access to [various medical records] in relation to their child's care on specified dates, including any associated correspondence and other relevant investigations.
2. The Agency located documents falling within the terms of the Applicant request and refused access to two documents under sections 30(1) and 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.
9. 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

10. 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; and
 - (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.

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

11. The exemption does not apply to purely factual material in a document.²
12. The documents subject to review are two incident reports relating to the Applicant's child. The Agency exempted all information under a section titled 'Journals and Actions' under section 30(1), which records actions taken by Agency officers and communications between Agency officers in the context of review of clinical incident notifications.

Do the documents 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. For the requirements of section 30(1) to be met, 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.
14. 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
15. Document 1 contains a record of instructions sent between Agency officers during the review of the incident. It does not contain findings or outcomes of the review into the incident, rather it is predominantly a record of administrative steps. However, a small amount of information is in the nature of opinion.
16. While Document 2 is similar, I am satisfied the nature of the record differs from Document 1 and contains matter in the nature of consultation between Agency officers and opinion of Agency officers. However, there is also factual information intertwined within the consultation, which I am satisfied is known to the Applicant based on publicly available material.

Were the documents 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?

17. 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
18. 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.

19. I am satisfied the information was provided in the course of the Agency's deliberative processes in relation to its review of clinical incidents for the purpose of identifying any systemic failures that need to be addressed.

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

20. In deciding if release is contrary to the public interest, I must consider all relevant facts and circumstances remaining mindful that the object of the FOI Act is to facilitate and promote the disclosure of information.

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].

21. In deciding whether the information exempted by the Agency would be contrary to the public interest, I have given weight to the following relevant 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.
22. The context of an incident report is sensitive as it concerns an investigation into events that occurred during the child's medical treatment, who passed away whilst receiving medical care.
23. I acknowledge the Applicant's genuine interest in seeking access to documents to fully understand the events associated with their child's medical care in a public hospital and the Agency's review of the patient's care.
24. I accept in the context of a death of a patient while in the care of a public hospital, there is a public interest in their family, who are directly impacted, being informed of the cause or of any event that may have contributed. Public knowledge of these events allows for informed decision making by patients regarding medical treatment and care and ensures accountability and transparency in the public health care system.
25. However, this public interest must be balanced against the potential for the processes employed to investigate serious clinical incidents to be undermined by the release of findings under the FOI Act. Given such investigations and their findings promote continuous improvement in practices, policies and procedures within the public health system, I accept it is essential such processes are as thorough and detailed as possible.
26. It is essential for the public to have confidence that when a serious event 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.⁷

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

⁷ Section 3.

27. In this matter, I consider disclosure of certain matter may result in Agency staff members being less willing to provide fulsome and detailed opinions in future in the context of reviews of serious clinical incidents that result in serious harm to, or the death of a patient while in the care of a public hospital. The implications of such an outcome could undermine the robustness of the Agency's investigative processes into these types of incidents which could undermine the opportunity to identify the cause of an incident and any necessary action to be taken to avoid the reoccurrence of similar events in the future.
28. Accordingly, I have determined certain information is exempt from release under section 30(1).
29. The Schedule of Documents in **Annexure 1** sets out my decision on section 30(1).

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

30. 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**);⁸ and
 - (b) such disclosure would be 'unreasonable'.

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

31. 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.⁹
32. A document will disclose a third party's personal affairs information if it is capable, either directly or indirectly, of identifying that person.
33. The personal affairs information in the documents are names, position titles and identification numbers of Agency officers. This includes persons who were involved in providing medical care to the Applicant's child or who viewed, edited or were alerted of the incident reports subject to review.
34. There are two entries in Document 2 containing the name of a business unit of the Agency that has been exempted under section 33(1). I am not satisfied this information is personal affairs information in the context of this document.

Would disclosure of the personal affairs information be unreasonable?

35. 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.
36. In *Victoria Police v Marke*,¹⁰ 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'.¹¹ 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'.¹²

⁸ Sections 33(1) and 33(2).

⁹ Section 33(9).

¹⁰ [2008] VSCA 218 at [76].

¹¹ Ibid.

¹² Ibid at [79].

37. 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 personal affairs information is the names, position titles and identification numbers of Agency officers who were involved in providing medical care or in the review of the incident.

This information was acquired by the Agency during the Agency officers' usual work duties and responsibilities. As such, I consider this personal affairs information largely relates to these individuals in the context of their professional roles rather than in their personal or private capacity.

However, having considered the particular circumstances of this matter, including the sensitive context and purpose of the documents, I accept the personal affairs information of Agency officers featured in the documents is sensitive in nature.

(b) The Applicant's 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).¹³

I acknowledge the Applicant has a strong interest in obtaining access to the documents which concern their child's medical care.

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

As discussed above, when serious clinical incidents occur that may result in serious harm to, or the death of a patient while in the care of a public hospital, there is a public interest in those persons who are directly impacted being informed of the cause of the incident. In my view, disclosing the names, position titles and identification numbers of Agency officers will not fulfil this public interest.

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

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

There is no information before me to suggest the Applicant intends to disseminate the documents.

(e) 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

¹³ *Victoria Police v Marke* [2008] VSCA 218 at [104].

information and seek their view as to whether disclosure of the document should occur.¹⁴ However, this obligation does not arise in certain circumstances.¹⁵

The Agency did not consult with third parties to obtain their views on disclosure of their personal affairs information.

In 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.

- (f) Whether disclosure of the information would or would be reasonably likely to endanger the life or physical safety of any person¹⁶

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.¹⁷

There is no information before me to suggest this factor is relevant to this matter.

38. On balance of the above factors, I am satisfied it would be unreasonable to release the personal affairs information of Agency officers in the circumstances of this matter. Accordingly, it is to remain exempt from release under section 33(1).
39. The Schedule of Documents in **Annexure 1** sets out my decision on section 33(1).

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’¹⁸ 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 25.¹⁹
42. 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, because it would not require substantial time and effort, and the edited documents would retain meaning.

Conclusion

43. On the information before me, I am satisfied certain information in the documents is exempt from release under sections 30(1) and 33(1). However, I have decided further information is to be released where it is not exempt from release.
44. As I am satisfied it is practicable to provide the Applicant with an edited copy of the documents with exempt information deleted in accordance with section 25, access is granted in part.

¹⁴ Section 33(2B).

¹⁵ Section 33(2C).

¹⁶ Section 33(2A).

¹⁷ Section 33(2A).

¹⁸ *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].

¹⁹ *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], [155].

45. A marked-up copy of the documents indicating exempt information in accordance with my decision has been provided to the Agency.
46. The Schedule of Documents in **Annexure 1** sets out my decision.

Review rights

47. 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.²⁰
48. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.²¹
49. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.²²
50. 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.
51. 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.²³

When this decision takes effect

52. 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.

²⁰ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

²¹ Section 52(5).

²² Section 52(9).

²³ 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]	Incident Report	4	Released in part Sections 30(1), 33(1)	Release in part Sections 30(1), 33(1), 25	<p>Section 30(1): I am satisfied the document contains information that 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 the document contains information that 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 this document with exempt information deleted in accordance with section 25.</p>
2.	[Date]	Incident Report	6	Released in part Sections 30(1), 33(1)	Release in part Sections 30(1), 33(1), 25	See comments for Document 1.