

Notice of Decision and Reasons for Decision

Applicant: 'FA7'
Agency: Department of Health
Decision date: 17 March 2023
Exemptions considered: Sections 33(1), 35(1)(b)
Citation: 'FA7' and Department of Health (Freedom of Information) [2023]
VICmr 15 (17 March 2023)

FREEDOM OF INFORMATION – psychiatric records – information provided in confidence – documents affecting personal privacy – deceased patient – historical records – statements from an employer

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.

I am not satisfied information to which the Agency refused access under sections 33(1) and 35(1)(b) is exempt information.

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner
17 March 2023

Reasons for Decision

Background to review

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

...I am seeking records of –

1 ----the warrants for [name] [date of birth], [their] admittance/committal to [named hospital], on or about [date]...

2----the medical records of [name], for the approximately 6 months [they] spent in [named hospital] in [year]...
2. The Agency identified one document, comprising 113 pages, falling within the terms of the Applicant's request. It determined to release 106 pages in full, one page in part and refused access to six pages in full under sections 33(1) and 35(1)(b).
3. 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 pages 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. During the review, OVIC staff provided the Agency with an initial view that certain content on page 79, subject to review, was not exempt from release and invited it to reconsider the exemptions applied. The Agency maintained its reliance on sections 33(1) and 35(1)(b) to this content.
8. I have considered all communications and submissions received from the parties.
9. 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.
10. 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.
11. 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.

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

Review of exemptions

Section 33(1) – Documents affecting personal privacy

12. A document is an exempt document under section 33(1) if two conditions are met:
- (a) disclosure of the document would involve the disclosure of information relating to the personal affairs of any person (including a deceased person); and
 - (b) disclosure of the personal affairs information would be unreasonable.

Does the document contain personal affairs information?

13. Information relating to a person's 'personal affairs' includes information that identifies any person, discloses their address or location, or any information from which a person can reasonably be identified.²
14. It has also been held information relates to an individual's personal affairs if it 'concerns or affects that person as an individual'.³
15. The expression of opinions and observations made, can fall within the definition of personal affairs information of a third party.⁴
16. The document in this case is an old psychiatric file concerning the care and treatment of the Applicant's deceased [family member] (**the patient**). Following the closure of hospitals such as (**treating hospital**), the Agency has undertaken the role of custodian of these records for the purposes of FOI.
17. The Agency released the majority of the document to the Applicant, withholding page 79 in part and pages 85, 86 and 89-92 in full. The withheld information is information provided to the treating hospital by third parties, provided for the purpose of assisting in the care and treatment of the patient.
18. I am satisfied the written statements, which include third party personal experiences with the patient, constitute the personal affairs information of those third parties. However, to make out the exemption under section 33(1) I must also consider whether disclosure of the personal affairs information would be unreasonable.

Would disclosure of the written statements be unreasonable?

19. The concept of 'unreasonable disclosure' involves balancing the public interest in the disclosure of official information with the personal interest in privacy.
20. I note the views expressed by the Victorian Court of Appeal in *Victoria Police v Marke*,⁵ which held 'there is no absolute bar to providing access to documents which relate to the personal affairs of others', and 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'.⁶

² Section 33(9).

³ *Hanson v Department of Education & Training* [2007] VCAT 123 at [9].

⁴ *Richardson v Business Licensing Authority* [2003] VCAT 1053.

⁵ [2008] VSCA 218 at [76].

⁶ *Ibid.*

21. Generally speaking, mental health records are extremely sensitive records. They should be treated with a high level of confidentiality and release of information to any other person must be carefully considered.
22. Understandably, given the age of the document (approximately 64 years), I do not have the views of the third parties who provided this information to the treating hospital before me. Therefore, I have formed my decision on disclosure by examining the surrounding information in the record and having regard to any sensitivities surrounding disclosure of the personal affairs information now as opposed to when the record was first created.

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23. With respect to the information deleted on page 79, while I acknowledge the initial sensitivity of the information as it concerns the private affairs of the patient, after careful inspection of the document, particularly information on pages 65, 66 and 68 (which is already in the possession of the Applicant), I do not consider the information to be as sensitive as initially considered. The information on the page, of which I note the majority has been released, provides a chronology of the patient's early childhood, provided to the treating hospital by the patient's [family member]. When read in context, I consider the connotation of the statements to be quite innocent and made for the purpose of assisting the care and treatment of the patient.
24. Therefore, having carefully considered the information and the purpose for which it was provided and having regard to all other information in the document, I am not satisfied it would be unreasonable to disclose, particularly noting the Agency has disclosed all other statements provided by this third party to the Applicant.
25. Accordingly, I am not satisfied section 33(1) applies to this information.

Pages 85, 86 and 89-92

26. The information exempted by the Agency concerns statements provided to the treating hospital from a third party. The Agency has withheld both statements in full.
27. I generally accept that the disclosure of confidential statements, which provide a person's version of events would, in most cases, not be suitable for release. However, this is not without qualification and the correct application of section 33(1) requires consideration of all matter that may 'relevantly, logically, and probatively' bear upon the question of whether release of personal affairs information would be unreasonable.⁷
28. In this case, I have given particular consideration to the age of the document, the sensitivity of the information within the current context of its release and whether disclosure would impair any relationships or processes of the Agency.
29. I accept that at the time the treating hospital received this information it did so under confidential circumstances. Nonetheless, given the passage of years since the information was communicated, the sensitivity that would have once protected the document from being disclosed, in my view, has significantly reduced. The information concerns concluded matters where there is little likelihood that disclosure would impact the personal or professional relationships of the third party. Nor do I consider the Agency has satisfied me that disclosure of the information in this case would unreasonably impact the work of the Agency.

⁷ *Victoria Police v Marke* [2008] VSCA 218 at [86].

30. To the extent the Applicant seeks a full copy of the record with no redactions, their purpose would be met by disclosure of the information. I also consider there is a low likelihood the Applicant would further disseminate the material. These factors all weigh in favour of disclosure.
31. Lastly, in determining whether 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.⁸ However, I do not consider this is a relevant factor in this matter.
32. Therefore, having regard to all matters that relevantly, logically and probatively bear upon the question of whether release would be unreasonable, I am not satisfied section 33(1) applies to the document.

Section 35(1)(b) – Documents containing material obtained in confidence

33. A document is an exempt document under section 35(1)(b) if two conditions are satisfied:
 - (a) disclosure of the document would divulge information or matter communicated in confidence to an agency or Minister; and
 - (b) disclosure would be contrary to the public interest as it would be reasonably likely to impair the ability of the agency or Minister to obtain similar information in the future.
34. When considering whether information was communicated in confidence, I must consider the matter from the perspective of the person who gave the information to the Agency.⁹ Confidentiality can be expressed or implied from the circumstances of a matter.¹⁰
35. As stated above, the information withheld by the Agency concerns information communicated by third parties to the treating hospital. Having viewed the information and noting the confidential markings, I am satisfied at the time the information was communicated to the treating hospital it was done so in confidence.
36. However, the exemption under section 35(1)(b) also requires that I consider whether the Agency would be impaired from obtaining similar information in the future if the information is disclosed under the FOI Act. While there is a strong line of authority supporting the proposition that disclosing third party statements would impair agencies (like the treating hospital) ability to obtain such information in the future. Nonetheless, each case must be considered in its own merit.
37. While a document may be marked confidential, this is no guarantee to how the document will be treated if there is a request under the FOI Act.¹¹
38. In *Medical Practitioners Board of Victoria v Sifredi*,¹² the Court held that a response given by a practitioner to the Board in the course of its enquiry was not exempt from release because the evidence did not establish that a practitioner would not respond to a request for information from the Board. Merely that they may respond with less frankness and candour. Put another way, evidence of the ability of an agency to obtain similar information in the future will not arise if the impairment goes no further than mere lack of candour or greater circumspection.¹³
39. Similar to my considerations under section 33(1), I also consider the significant passage of time in this matter bear upon the question of whether disclosure would be contrary to the public interest. In

⁸ Section 33(2A).

⁹ *XYZ v Victoria Police* [2010] VCAT 255 at [265].

¹⁰ *Ibid.*

¹¹ *AOZ v JVL* [2019] VCAT 31 at [154].

¹² (2000) 16 VAR 347 at [19].

¹³ *Corry v Police (Vic)* [2010] 282 [28]; *Ryder v Booth* [1985] VR 869.

viewing the exempted information, I consider it holds no current relevance. That is, it is not related to the ongoing treatment of a patient, or complaint, or any matter involving the Agency.

40. The statements on pages 85-86 and 89-92 were provided to the treating hospital by the patient's former employer. I am not satisfied the Agency has provided sufficient evidence to demonstrate how release of the information now would restrict those in the communicator's position from providing information to an agency like the treating hospital, as to dry up future sources. While release may result in an employer being more prudent or less candid than they may have otherwise been, in my view the degree of impairment in this case is not enough to give rise to the exemption under section 35(1)(b).
41. Further, in relation to the information exempted from release on page 79, I note the Agency has released other statements provided by this third party to the Applicant. I do not consider release of the remaining statements would be contrary to the public interest. Therefore, I am not satisfied the public interest would be prejudiced by release of this information.
42. Accordingly, the Agency has not satisfied me that disclosure of the third parties' statements would be contrary to the public interest and the exemption under section 35(1)(b) is not made out.

Conclusion

43. On the information before me, I am not satisfied information to which the Agency refused access on pages 79, 85, 86 and 89 to 92 is exempt from release under sections 33(1) and 35(1)(b). As such, this information is to be released to the Applicant.

Review rights

44. 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.¹⁴
45. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹⁵
46. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹⁶
47. 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.
48. 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.¹⁷

Third party review rights

49. As I have determined to release documents that contain the personal affairs information of persons other than the Applicant, as well as information the Agency exempted from release under section 35(1)(b), if practicable, I am required to notify the relevant third parties of their right to seek review by VCAT of my decision within 60 days from the date they are given notice.¹⁸

¹⁴ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

¹⁵ Section 52(5).

¹⁶ Section 52(9).

¹⁷ Sections 50(3F) and 50(3FA).

¹⁸ Sections 49P(5), 50(3), 50(3AB) and 52(3).

50. In the circumstances, I am satisfied it is not practicable to notify the relevant third parties given the passage of time since the documents were created and the difficulty of locating contact information for these parties or their next of kin.

When this decision takes effect

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