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Notice of Decision and Reasons for Decision

Applicant: 'CK3'
Agency: Medical Panels
Decision date: 7 December 2020
Exemptions considered: Sections 30(1), 33(1)

Citation: 'CK3' and Medical Panels (Freedom of Information) [2020] VICmr 341
(7 December 2020)

FREEDOM OF INFORMATION – medical notes – personal affairs information – internal communications

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 Document 3 is exempt under section 33(1). However, I am not satisfied Document 2 is exempt under section 30(1).

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, I have granted access to one document in part and one document 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

7 December 2020

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency seeking access to certain documents.
2. Following consultation with the Agency, the Applicant clarified the initial request.
3. The clarified request seeks access to the following documents:
 - Instructions that were given to the examining psychiatrists as to the nature of the questions they were required to ask [the Applicant] in [their] Medical Panel appointment;
 - Notes prepared by the [physician type] Physician from the appointment, in particular anything relevant to [the Applicant] [circumstances]; and
 - [the Applicant] sent a letter to the Medical Panel after the conclusion of the appointments and received a response letter from the Medical Panels. As such, [the Applicant] request any notes or instructions made with regard to providing that response letter; and
 - DVDs of the appointment[s], recordings of the appointment[s], documents that were given to other agency[s] on the appointment[s].
4. In its decision, the Agency identified three documents falling within the terms of the Applicant's request and granted access to one document in full and two documents in part, relying on sections 30(1) and 33(1) to refuse access to certain information in the documents.
5. The Agency's decision letter sets out the reasons for its decision.
6. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.

Medical Panels

7. The 'Convenor of Medical Panels' is a government authority established under an Act of Parliament.
8. The requested documents relate to a Medical Panel, which I am satisfied is a 'prescribed authority' for the purposes of section 5(1).
9. The Medical Panels website provides the following information:

Medical Panels provide expert panels of specialist doctors who come together to resolve medical questions if there is disagreement or uncertainty under the workers' compensation and personal injury legislation.

Each Medical Panel is independent and functions as a tribunal that provides final and legally binding answers to referred questions.

10. Medical Panels deal with two types of referrals:
 - (a) workers compensation referrals under the *Wrongs Act 1958* (Vic), *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic) and the *Accident Compensation Act 1985* (Vic); and
 - (b) referrals under the *Wrongs Act 1958* (Vic).

Review

11. I have examined copies of the documents subject to review.

12. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
13. I have considered all communications and submissions received from the parties.
14. 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.
15. I note Parliament's intention the FOI Act must be interpreted so as to further the object of the Act and that 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.

Adequacy of Agency document searches

16. During the review, the Applicant raised concerns about the adequacy of the Agency's document searches and documents they believed to be missing.
17. In accordance with section 61B(3), these concerns were addressed as part of this review. OVIC staff made enquiries with the Agency regarding the Applicant's concerns. I accept the Agency's responses and am satisfied the Agency undertook a thorough and diligent search for relevant documents. The outcome of OVIC's enquiries were communicated to the Applicant, including that additional enquiries raised with OVIC could be the subject of a new FOI request made to the Agency.

Review of exemptions

Section 30(1)

18. 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 in 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
 - (c) disclosure of the matter would be contrary to the public interest.
19. The exemption does not apply to purely factual information in a document.¹
20. The term 'officer of an Agency' is defined in section 5(1). It includes a member of an agency and any person engaged by or on behalf of an agency, whether or not that person is subject to the *Public Administration Act 2004* (Vic).²

Do the documents disclose matter in the nature of opinion, advice or recommendation prepared by an officer or minister or in consultation or deliberation that has taken place between officers, Ministers or an officer and a Minister?

21. The document subject to review is a medical report that contains notes and findings about the Applicant's medical condition. The information exempted by the Agency under section 30(1) relates

¹ Section 30(3).

² See *Koch v Swinburne University* [2004] VCAT 1513 at [15]; *Thwaites v Department of Human Services* (No 2) (1998) 14 VAR 347.

to preliminary comments and opinions of Agency officers who conducted the referral to the Medical Panel.

22. Having reviewed the document, I am satisfied it contains matter in the nature of advice, opinion, recommendations, consultation or deliberation between Agency officers.

Was the information communicated in the course of the Agency's deliberative processes?

23. The term 'deliberative process' is interpreted widely and includes any of the processes of deliberation or consideration involved in the functions of an agency, Minister or government.³

24. In *Re Waterford and Department of Treasury (No.2)*,⁴ the 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.

25. Having reviewed the document, I am satisfied the information was provided in the course of the Agency's deliberative processes in connection with medical referrals under the *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic) and the *Wrongs Act 1958* (Vic).

Would disclosure of the documents be contrary to public interest?

26. In determining whether disclosure of the information exempted by the Agency would be contrary to the public interest I have given weight to the following factors.

- (a) the general right of every person to seek access to government 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 if the documents were disclosed;
- (f) the impact of disclosing documents in draft form, including disclosure would not clearly or accurately represent a final position or decision reached by the Agency at the conclusion of a decision or related 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.

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

⁴ (1981) 1 AAR 1.

27. In the circumstances of this matter, I have determined disclosure of information in the documents would not be contrary to the public interest for the following reasons:
- (a) I acknowledge information concerning the health of individuals is generally sensitive and confidential in nature. Further, I note the Agency's submission the opinions of the Medical Panel are generally considered sensitive in nature. However, in the circumstances of this matter, most of the information exempted by the Agency is similar to other information in the document that was released by the Agency. Further, the personal affairs information relates to the Applicant rather than a third party.
 - (b) I note the Agency's submission disclosure of the document could undermine the final opinion of the Medical Panel, where there are differences between preliminary comments in the document and the final version. However, I am of the view members of the public are capable of understanding differences between documents in draft and final form. In any case, I consider disclosure of these documents will assist the Applicant in gaining a better understanding of the information in the document and how it relates to any final decision.
 - (c) I am not satisfied disclosure of this information would negatively impact on the quality of advice and opinion prepared by the Agency officers in the future. In this case, the Agency officers are medical professionals who are obliged to provide independent and accurate medical opinions and advice. Further, I note the views in *Graze v Commissioner for State Revenue*,⁵ in which it was observed the possibility of public scrutiny, in some circumstances, will provide for better administrative decision making, which is in the public interest.
 - (d) Lastly, I note the Agency's submission Medical Panels are required to provide comprehensive reasons that set out the basis for an opinion, which includes all matters relevant to a final decision. Further to that point, I consider there is a public interest in persons, who are affected by a Medical Panel decision, being informed about the way in which a Medical Panel has carried out its statutory duties and functions.
28. Accordingly, I am satisfied disclosure of the document would not be contrary to the public interest and the document is not exempt under section 30(1).

Section 33(1)

29. A document is exempt under section 33(1) if two conditions are satisfied:
- (a) disclosure of the document under the FOI act would 'involve disclosure of information relating to the 'personal affairs' of a person other than the Applicant;⁶ and
 - (b) such disclosure would be 'unreasonable'.

Do the documents contain personal affairs information?

30. Information relating to a person's 'personal affairs' includes any information that identifies any person or discloses their address or location. It includes any information from which such information may be reasonably determined.⁷
31. The document contains the name of an Agency officer.
32. I am satisfied the information exempted by the Agency is 'personal affairs information' for the purposes of section 33.

⁵ [2013] VCAT 869.

⁶ Sections 33(1) and (2).

⁷ Section 33(9).

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

33. 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 person other than an applicant (a **third party**).⁸
34. The nature of disclosure of a document under the FOI Act is unconditional and unrestricted, which means an applicant is free to disseminate widely or use a document as they choose following its release.⁹
35. In an appeal concerning the operation of section 33(1) the Victorian Court of Appeal stated the following:¹⁰

On the contrary, it stipulates as the only condition for the determination of whether a document is an exempt document that the disclosure of the exempt document 'would involve the unreasonable disclosure of information relating to the personal affairs of any person'.

The very significant public interest sought to be protected by that condition, namely the right of any person to have his or her personal affairs kept private, suggests to me that the condition should not be construed narrowly. Section 33(1) of the Act is the legislature's attempt to reconcile two important, but competing, objectives: the public interest in disclosure and the personal interest of privacy. The mechanism chosen by the legislature to reconcile those objectives is to require a decision-maker to balance them against each other by identifying and inquiring into the facts relevant to that balancing process and making an evaluation of which is to prevail. The condition posed by section 33(1) for its application depends, like that in section 35(1)(b) and others, upon a question dependent upon the particular facts of an actual application. [Footnotes removed]

36. I also note *Coulson v Department of Premier and Cabinet*,¹¹ in which the Victorian Civil and Administrative Tribunal (VCAT) held that whether or not an agency officer's personal affairs information in a document is exempt under section 33(1) must be considered in the circumstances of each matter. Therefore, the proper operation 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'.¹²
37. In determining whether disclosure of personal affairs information would be unreasonable in the circumstances of this matter, I have considered the following factors:¹³
 - (a) the nature of the personal affairs information;
 - (b) the circumstances in which information was obtained by the Agency;
 - (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 the release of the information;
 - (e) whether any individuals to whom the information relates object, or would be likely to object to the release of the information;
 - (f) the likelihood of further disclosure of the information if released under the FOI Act in the context of the information proposed to be disclosed; and

⁸ *Re Page v Metropolitan Transit Authority* (1988) 2 VAR 243 at 245-6.

⁹ *Victoria Police v Marke* [2008] VSCA 218 at [68].

¹⁰ *Victoria Police v Marke* [2008] VSCA 218 at [95]

¹¹ *(Review and Regulation)* [2018] VCAT 229.

¹² *Victoria Police v Marke* [2008] VSCA 218 at [104].

¹³ *Ibid.*

- (g) whether disclosure of the information or would be reasonably likely to endanger the life or physical safety of any person.
38. The Agency advises it consulted with a third party, whose personal affairs information appears in the document, as required under section 33(2B) and provided a copy of that individual's response for my consideration.
39. I note the third party objects to disclosure of their personal affairs information to the Applicant. However, while the fact a person does not agree to the disclosure of their personal affairs information is a relevant consideration, is not a determinative factor.¹⁴
40. The nature of the personal affairs information is the last name of an individual employed by the Agency. I note the information was acquired by the Agency in the course of the Agency officer's undertaking their regular work duties and responsibilities. Therefore, in the context of the documents subject to review, I consider the information in the document concerns the individual in a professional context rather than in their personal or private life.
41. However, I accept the Agency's submission the Agency officer is an administrative officer whose involvement in the matter was peripheral. In circumstances where an individual has had a peripheral role in a matter and where the Applicant does not already know this information, I am of the view disclosure is more likely to be unreasonable.
42. I am also required to consider whether disclosure of the personal affairs information would be reasonably likely to endanger the life or physical safety of any person.¹⁵ 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 to be a relevant factor in this matter.
43. In balancing the above factors, I am satisfied it would be unreasonable to disclose the personal affairs information subject to review where the Agency officer has had a peripheral role in the matter.
44. Accordingly, I am satisfied disclosure of the personal affairs information in the documents would be unreasonable in the circumstances and is exempt under section 33(1).

Deletion of exempt or irrelevant information

45. Section 25 requires an agency to grant access to an edited copy of a document when it is practicable to delete exempt or irrelevant information and the applicant agrees to receiving such a copy.
46. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'¹⁶ 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 25.¹⁷
47. I have considered whether it is practicable to provide the Applicant with an edited copy of the documents with exempt information deleted in accordance with section 25. I am satisfied it is practicable to delete the exempt information, as to do so would not require substantial time and effort, and the edited documents would retain meaning.

¹⁴ *Marke v Victoria Police* (2007) 28 VAR 84; [2007] VSC 522 at [45], *Marke v Victoria Police* [2007] VCAT 747 at [22].

¹⁵ Section 33(2A).

¹⁶ *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].

¹⁷ *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].

Conclusion

48. On the information before me, I am satisfied certain information in Document 3 is exempt under section 33(1). However, I am not satisfied Document 2 is exempt under section 30(1).
49. 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, I have granted access to one document in part and one document in full.
50. The Schedule of Documents in **Annexure 1** sets out my decision in relation to each document.

Review rights

51. If either party to this review is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.¹⁸
52. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹⁹
53. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.²⁰
54. 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.
55. 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

When this decision takes effect

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

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 (3FA).

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	Number of Pages	Agency Decision	OVIC Decision	OVIC Comments
1.	[date]	Medical progress notes	2	Released in full	Not subject to review	
2.	Undated	Medical Panels report	3	Released in part Section 30(1)	Release in full	Section 30(1): I am satisfied the document contains information in the nature of opinion, advice or recommendation provided by Agency officers in connection with the Agency's deliberative processes. For the reasons outlined above, I am not satisfied disclosure would be contrary to the public interest. Accordingly, I am not satisfied the document is exempt under section 30(1).
3.	[date]	Database note	1	Released in part Section 33(1)	Release in part Sections 33(1), 25 The document is to be released with the following information, which is exempt under section 33(1), deleted in accordance with section 25. <ul style="list-style-type: none"> The name of the Agency officer in the first line of text. 	Section 33(1): I am satisfied the disclosure of the personal affairs information the Agency determined is exempt under section 33(1) would be unreasonable to disclose for the reasons outlined above. 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.