

Notice of Decision and Reasons for Decision

Applicant:	'EJ9'
Agency:	Northern Health
Decision date:	2 December 2021
Provisions and exemption considered:	Sections 25A(1), 25A(5), 33(1)
Citation:	'EJ9' and Northern Health (Freedom of Information) [2021] VICmr 337 (2 December 2021)

FREEDOM OF INFORMATION – medical records – deceased [family member] – refusal to process request on grounds all documents, should any exist, would be exempt – disclosure of personal affairs information

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 fresh 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 have determined to refuse to grant access to the requested documents in accordance with the Applicant's FOI request, should any exist, under section 25A(5) rather than under section 25A(1) as determined by the Agency.

I am satisfied all documents sought, should any exist, would be exempt under section 33(1).

My reasons for decision follow.

Joanne Kummrow

Public Access Deputy Commissioner

2 December 2021

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency seeking access to the medical record of their deceased [family member].
2. The Agency refused to process the request under section 24A(1)(a) on grounds the Applicant's request was a repeated request for documents that were already held by the Applicant.
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. During the review, OVIC staff provided the Agency with direction on the requirements to claim section 24A(1); noting OVIC's initial view was that these requirements were not met. The Agency was invited to consider whether it may wish to make a fresh decision.
6. Section 49M(1) permits an agency to make a fresh decision on an FOI request during a review.
7. On [date], the Agency advised OVIC and the Applicant of its intention to make a fresh decision. Prior to making its fresh decision in which it intended to rely on section 25A(1) to refuse the request, the Agency wrote to the Applicant in accordance with section 25A(6) to advise of its likely decision and inviting the Applicant to consult on options for narrowing the terms of their request with a view to remove the proposed refusal grounds. The Agency did not receive any response to this attempted consultation.
8. On [date], the Agency made a fresh decision in which it determined to refuse to process the Applicant's request under section 25A(1) on the basis the work involved would substantially and unreasonably divert the Agency's resources from its other operations. The Agency advised:

In the determination of the Fresh Decision I have considered the earlier communication received which outlined your views on the requested *"information to be in full and with no redactions"*. Further, the no response to the letter sent on [date] to redefine the current scope to make it in a manner which is able to be processed. Finally, my decision is also based on the number of documents (2540+ more) within the scope of the request and the considerable amount of redactions that need to be applied to the majority of pages.

9. The Applicant did not agree with the Agency's fresh decision and, as required by section 49MA(2), I proceeded with my review on the basis of the fresh decision.
10. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review and I have considered all communications and/or submissions received from the parties.
11. I note the Applicant indicated they wished to make a further submission and was granted a lengthy extension of time of over six months to provide this. I have determined further delaying my decision pending the Applicant's provision of their submission is not appropriate, noting, I am required to finalise matters in a timely fashion and I do not consider a further submission is likely to impact on my final decision in the circumstances of this matter.

12. 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.
13. 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.

Section 25A(1)

14. In its fresh decision, the Agency refused to process the Applicant's request under section 25A(1).
15. However, based on information provided during the review, I am not satisfied it would be an unreasonable diversion of the Agency's resources to process the Applicant's request where it has previously processed a request for the same documents.
16. However, I note the Agency's submission and the Applicant's FOI request which advises the Applicant seeks access to any relevant documents in full, including the personal affairs information of Agency staff members. The Applicant has previously received copies of the requested documents. However, they have not received access to the documents in full.
17. Accordingly, I am not satisfied that section 25A(1) is the appropriate exemption to be applied and instead, I will consider the application of section 25A(5) to the requested documents.

Review of application of section 25A(5)

18. The power under section 25A(5) is carefully circumscribed.² A decision maker must be satisfied of the following three requirements that operate to limit its application:
 - (a) First, the exempt nature of the documents must be objectively apparent from the face of the request. Namely, the terms of the request, as described by the applicant. The 'nature' of a document refers to its inherent or essential quality or character.
 - (b) Second, it must be apparent all requested documents are exempt.
 - (c) Third, it must be apparent from:
 - (i) the nature of the documents, as described in the request, no obligation would arise for the agency to grant access to an edited copy of a document in accordance with section 25; or
 - (ii) the request, or through consultation with the applicant, they would not wish to have access to an edited copy of the document.³
19. An agency is not required to identify any or all documents to which an FOI request relates, or to specify in respect of each document, the relevant exemption under which a document is claimed to be exempt.

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

² *Knight v Corrections Victoria* [2010] VSC 338 at [37].

³ *Knight v Corrections Victoria* [2010] VSC 338.

Is the nature of the documents objectively apparent from the face of the Applicant's request?

20. I am satisfied the nature or character of the requested documents, as described in the Applicant's request, is apparent from the terms of the request, being their deceased [family member] medical record.
21. I note the Applicant's request seeks access to documents that were part of a previous OVIC review involving the Agency, and they seek access to the documents in full, including the names and other personal affairs information of Agency staff.

Would all documents, as described in the request, be exempt?

22. Based on the terms of the Applicant's request and noting they seek access to the personal affairs information of third parties, I consider it is appropriate for me to consider whether the requested documents would be exempt under section 33(1).

Section 33(1) – Personal affairs information of individual third parties

23. 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; and
 - (b) such disclosure would be 'unreasonable' in the circumstances.

Would the documents contain the personal affairs information of third parties?

24. Information relating to the 'personal affairs' of a person 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.⁴
25. A third party's opinion or observations about another person's conduct can constitute information related to the third party's personal affairs.⁵
26. The Applicant's request seeks access to medical records.
27. Accordingly, I am satisfied the requested documents, should any exist, would contain the personal affairs information of third parties.

Would the disclosure of the documents be unreasonable in the circumstances?

28. Determining whether disclosure of a document would be unreasonable involves balancing the public interest in the disclosure of official information held by a government agency with the interest in protecting an individual's personal privacy in the circumstances.⁶
29. The 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.⁷

⁴ Section 33(9).

⁵ *Richardson v Business Licensing Authority* [2003] VCAT 1053, cited in *Davis v Victoria Police* [2008] VCAT 1343 at [43]; *Pritchard v Victoria Police* [2008] VCAT 913 at [24]; *Mrs R v Ballarat Health Services* [2007] VCAT 2397 at [13].

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

⁷ *Victoria Police v Marke* [2008] VSCA 218 at [68].

30. 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’.⁸
31. 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.⁹
32. In determining whether disclosure of the named third party’s personal affairs information would be unreasonable in the circumstances, I have given weight to the following factors:¹⁰

(a) The nature of the personal affairs information and the circumstances in which information was obtained by the Agency

Having considered the nature of the Applicant’s request and the information provided by the Agency and the Applicant during the review, I consider the requested documents would contain sensitive personal information in relation to the Applicant’s deceased [family member] and their medical care.

I consider the documents would contain the personal affairs information of Agency officers. I note this information would have been acquired by the Agency in the course of the Agency officers’ usual work duties and responsibilities.

I acknowledge the Applicant may know the names of certain third parties named in the documents. However, even where an applicant claims to know the identity of a third party, disclosure of their personal affairs information under the FOI Act may still be unreasonable in the circumstances.¹¹

(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 in the circumstances.¹²

The Applicant seeks access to the documents to gain a further understanding of the circumstances surrounding their deceased [family member] medical care while a patient of the Agency.

I acknowledge the Applicant’s interest in obtaining access to the information. However, this is one factor and must be weighed against other relevant factors in an ‘attempt to reconcile two important, but competing, objectives: the public interest in disclosure and the personal interest of privacy’.

It is unclear whether the Applicant’s purpose for seeking the personal affairs information would be achieved by disclosure of the requested documents, where the personal affairs information is unlikely to add any further material value.

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

⁸ [2008] VSCA 218 at [104].

⁹ *Coulson v Department of Premier and Cabinet (Review and Regulation)* [2018] VCAT 229.

¹⁰ *Ibid.*

¹¹ *AB v Department of Education and Early Childhood Development* [2011] VCAT 1263 at [58].

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

I have carefully considered whether any public interest would be promoted by release of the requested documents, should any exist, based on the Applicant's stated purpose for seeking access to the documents.

I acknowledge the Applicant's personal interest in seeking access to the documents. However, I do not consider there to be any information before me to suggest that public interest would be promoted by the release of the personal affairs information contained in the document.

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

Having considered the context of the Applicant's request and the sensitive nature of the requested documents, I am satisfied that certain personal affairs information in the documents would have been provided to the Agency with an expectation of privacy.

Accordingly, I am satisfied those third parties would be reasonably likely to object to the release of their personal affairs information in these circumstances.

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

The nature of disclosure under the FOI Act is unconditional and unrestricted, which means an applicant is free to use or disseminate a document as they choose once it is released.¹³

I consider it is reasonably likely that the Applicant would further disclose or use the personal affairs information of the Agency staff members.

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

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 take into account whether disclosure of the information would, or would be reasonably likely to, endanger the life or physical safety of any person.¹⁴

Based on the information provided by the Agency and the Applicant as part of this review as well as the previous review involving the same documents, I consider there are reasonable grounds to consider that concerns exist about the effect of disclosure on the health and safety of Agency staff.

33. In balancing the above factors, I have determined the public interest in protecting the personal privacy of any third parties outweighs the Applicant's personal interest in obtaining access to the documents.
34. On the information before me, I am satisfied certain personal affairs information in the requested documents, should any exist, would be exempt under section 33(1) as its disclosure would be unreasonable in the circumstances.

Is it apparent from the nature of the documents that there is no obligation under section 25 to grant access to an edited copy of a document?

35. 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.

¹³ Ibid at [68].

¹⁴ Section 33(2A).

36. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'¹⁵ 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 25.¹⁶
37. The Applicant declined to receive an edited copy of any documents with exempt information deleted in accordance with section 25.
38. Accordingly, I am satisfied there is no obligation to provide an edited copy of a document, should any exist, with exempt information deleted in accordance with section 25.

Conclusion

39. On the information before me, I am satisfied certain content in all documents sought would be exempt under section 33(1).
40. I am satisfied there is no obligation to prepare and provide the Applicant with edited copies of any relevant documents with exempt information deleted in accordance with section 25 as the Applicant only seeks the documents in full.
41. As the Applicant does not wish to receive an edited copy of any relevant document with exempt information deleted, I consider any document sought would be exempt in full.
42. Accordingly, I am satisfied the requirements for section 25A(5) are met, and access to the requested documents in accordance with the Applicant's request is refused under section 25A(5).
43. The effect of my decision is the Agency is not required to process the Applicant's request.

Review rights

44. If the Applicant is not satisfied with my decision, they are entitled to apply to the Victorian Civil and Administrative Tribunal (**VCAT**) for it to be reviewed.¹⁷
45. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹⁸
46. 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.
47. 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.¹⁹

¹⁵ *Mickelborough v Victoria Police (General)* [2009] VCAT 2786 [31]; *The Herald and Weekly Times Pty Limited v The Office of the Premier (General)* [2012] VCAT 967 at [82].

¹⁶ *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].

¹⁷ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

¹⁸ Section 52(5).

¹⁹ Sections 50(3F) and (3FA).