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Information Commissioner

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## Notice of Decision and Reasons for Decision

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Applicant:	'BT8'
Agency:	The Royal Women's Hospital
Decision date:	30 June 2020
Exemption considered:	Section 33(1)
Citation:	'BT8' and <i>The Royal Women's Hospital (Freedom of Information)</i> [2020] VICmr 190 (30 June 2020)

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FREEDOM OF INFORMATION – historical medical record – labour record – birth mother – adoptee – pregnancy information – siblings – personal affairs information of birth mother – personal affairs information of child – disclosure not unreasonable

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 not satisfied all personal affairs information in the document is exempt under section 33(1) as its disclosure is not unreasonable in the circumstances of this matter.

As I am satisfied it is practicable to provide the Applicant with an edited copy of the documents in accordance with section 25, I have determined to grant access to the documents in part.

My reasons for decision follow.

**Joanne Kummrow**

Public Access Deputy Commissioner

30 June 2020

## Reasons for Decision

### Background to review

1. The Applicant, through their representative, made a request to the Agency for access to their birth mother's medical and labour record detailing the Applicant's birth in [year]. It is clear from the documents the Applicant was adopted after their birth.
2. In its decision, the Agency identified one document, comprising 16 pages, falling within the terms of the Applicant's request. It granted access to four pages in part and released 12 pages in full.
3. The Agency relied on the exemption under section 33(1) to refuse access to certain information in document. The Agency's decision letter sets out the reasons for its decision.

### Review

4. The Applicant, through their representative, sought review by the Information Commissioner under section 49A(1) of the Agency's decision.
5. In their application for review, the Applicant states they seek access to the records to assist them in finding their biological family members. I understand the Applicant has been unable to locate their birth mother, despite having her full name, date of birth and other personal affairs information.
6. I have examined a copy of the document subject to review.
7. Firstly, I note the document came into existence more than five years prior to the commencement of the FOI Act.
8. Section 67 provides:

#### **67 Retrospective operation of law**

- (1) An applicant for access to records about himself, within the meaning of section 33, shall be entitled to receive access subject to this Act to any such record notwithstanding that the record came into existence at any time prior to the date of commencement of this section.
  - (2) An applicant for access to a document other than those referred to in subsection (1) shall be entitled to receive access, subject to this Act, to any such document provided that it came into existence not more than five years prior to the date of commencement of this section.
9. In seeking access to the records, which contain the personal affairs information of the Applicant's birth mother (the **birth mother**), I also consider the document contains the Applicant's personal affairs information within the meaning of section 33(1). Specifically, it contains information that relates to the Applicant's biological family members.
  10. As such, the document is subject to access under the FOI Act.
  11. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
  12. I have considered all communications and submissions received from the parties, including:
    - (a) the Agency's decision on the FOI request;

- (b) the Applicant's submission dated [date] and information provided with their review application;
  - (c) the Agency's submission dated [date]; and
  - (d) all communications between OVIC and the Agency and Applicant.
13. 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.
14. Further, I note Parliament's intention that the FOI Act must be interpreted so as to further the object of the Act and that any discretions conferred by this Act must be exercised, as far as possible, so as to facilitate and promote the disclosure of information.

## **Review of exemptions**

### ***Section 33(1) – personal affairs information of third parties***

15. 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;<sup>1</sup> and
  - (b) such disclosure would be 'unreasonable'.
16. Section 33(2) states:
- Subject to subsection (2AB), (2AC) or (4), the provisions of subsection (1) do not have effect in relation to a request by a person for access to a document by reason only of the inclusion in the document of matter relating to that person.

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

17. 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 such information may be reasonably determined.<sup>2</sup>
18. As set out above, I consider the document contains both the personal affairs information of the birth mother and the Applicant, which was recorded by the Agency at the time of the Applicant's birth. Specifically, certain personal affairs information of the birth mother is intertwined with that of the Applicant's personal affairs information. As such, I am satisfied section 33(2) does not apply and it is necessary to consider whether disclosure of this information would be unreasonable in the circumstances.
19. The information exempted by the Agency under section 33(1) includes an (old) telephone number, a previous address and information concerning the birth mother's religion and personal health, including their cytology results and menstrual cycle.
20. I am satisfied the information exempted by the Agency is 'personal affairs information' for the purposes of section 33(1).

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<sup>1</sup> Sections 33(1) and (2).

<sup>2</sup> Section 33(9).

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

21. The concept of 'unreasonable disclosure' involves balancing the public interest in the disclosure of official information with the protection of a person's right to privacy in the circumstances.
22. In determining whether disclosure of the personal affairs information would be unreasonable, I have considered the following factors:

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

I have considered a number of factors in relation to the nature of the information exempted by the Agency in the document:

- i. The information was obtained for the purpose of recording a detailed medical history for the Applicant's birth mother. I consider such information is generally sensitive and personal in nature.<sup>3</sup>
- ii. However, in the circumstances, I consider the sensitivity of certain information has diminished over time since the documents were created [over 45 years] ago.
- iii. A considerable amount of personal affairs information in the document was released to the Applicant, which includes medical information about the birth mother.
- iv. As described above, some of this information is intertwined with the Applicant's personal affairs information. In my view, this includes any numbers entered against 'gravida' and 'para', which I consider relates to both the birth mother and the Applicant, as it contains information that relates to any biological family members of the Applicant.
- v. I consider certain information that records the absence of known or conclusive information may cause the Applicant to mistakenly consider the exempted information is complete.
- vi. In my view the birth mother's telephone number and all previous addresses, are no longer sensitive information given the passage of time.
- vii. However, I consider information regarding the birth mother's religion and personal health, including their cytology results and menstrual cycle is of a personal nature.

(b) The extent to which the information is available to the public

The information sought is not publicly available.

(c) The likelihood of further disclosure of information, if released

The nature of disclosure under the FOI Act is unconditional and unrestricted, which means an applicant is free to disseminate widely or use a document as they choose once it is released to them.<sup>4</sup> Accordingly, I must consider the likelihood and potential effects of further dissemination of the personal affairs information of third parties, if released under the FOI Act.

There is no information before me to suggest the Applicant would widely disclose or disseminate the personal affairs information if disclosed given the particular and personal circumstances of this matter. As such, I consider it is reasonably likely the information in the document would inform, rather than be able to be used or disseminated, by the Applicant.

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<sup>3</sup> *Page v Metropolitan Transit Authority* [1988] 2 VAR 243 at [246].

<sup>4</sup> *Victoria Police v Marke* [2008] VSCA 218 at [68].

(d) Whether any public interest would be promoted by disclosure of the information

I acknowledge there is generally a strong interest in protecting a person's right to privacy in relation to information they provide to a health service or information a health service collects and records about a patient.

However, in the unique circumstances of this matter, I consider there is a public interest in disclosure of such documents that may assist the Applicant, as an adoptee, to obtain important information that concerns their personal affairs, namely their biological family members. I consider this interest is strengthened where there are few other avenues for the Applicant to obtain such information despite them having access to the full name and date of birth of their birth mother.

(e) Whether the individuals to whom the information relates object, or would be likely to object, to its release

The Agency advised it was not practicable to consult with the Applicant's birth parent. I have considered the Agency's reasons and accept consultation is not practicable in the circumstances. Accordingly, my decision is made in the absence of their views as to disclosure.

(f) The Applicant's interest in the information, and whether their purpose for seeking the information is likely to be achieved

I acknowledge the Applicant's personal interest in seeking access to the requested document and consider it may assist the Applicant to obtain information that concerns their personal affairs, namely whether they have any biological family members.

(g) Whether disclosure of information would, or would be reasonably likely to endanger the life or physical safety of any person<sup>5</sup>

There is no information before me to suggest this is a relevant factor in this case.

23. Having balanced the above factors, I am satisfied disclosure of certain personal affairs information exempted by the Agency in the documents would not be unreasonable as it is intertwined with the Applicant's personal affairs information or the sensitivity of certain information has diminished over time since the documents were created, specifically:

- (a) the numbers and/or notations entered against 'gravid' and 'para' on pages 1 and 5 and in the table headed 'Previous pregnancies' on page 5;
- (b) the number on page 9;
- (c) the birth mother's telephone number on page 1; and
- (d) the birth mother's previous addresses on page 5.

24. Accordingly, the above information in the documents is not exempt under section 33(1).

25. However, I am satisfied it would be unreasonable to disclose the following information as it is personal in nature and pertains to the birth mother as an individual:

- (a) the birth mother's religion on pages 1 and ;
- (b) the birth mother's cytology results on page 4; and

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<sup>5</sup> Section 33(2A).

(c) birth mother's menstruation information on page 5.

26. Accordingly, the above information in the documents is exempt under section 33(1).

### **Conclusion**

27. On the information before me, I am not satisfied all personal affairs information in the document is exempt under section 33(1) as its disclosure would not be unreasonable in the particular circumstances of this matter.

28. As I am satisfied it is practicable to provide the Applicant with an edited copy of the documents in accordance with section 25, I have determined to grant access to certain documents in part.

### **Review rights**

29. If either party is not satisfied with my decision, they are entitled to apply to the Victorian Civil and Administrative Tribunal (**VCAT**) for it to be reviewed.<sup>6</sup>

30. The Applicant may apply for a review up to 60 days from the date they are given this Notice of Decision.<sup>7</sup>

31. The Agency may apply for a review up to 14 days from the date it is given this Notice of Decision.<sup>8</sup>

32. Information about how to apply to VCAT for review is available at [www.vcat.vic.gov.au](http://www.vcat.vic.gov.au). Alternatively, VCAT may be contacted by email at [admin@vcat.vic.gov.au](mailto:admin@vcat.vic.gov.au) or telephone on 1300 018 228.

33. The Agency must notify the Information Commissioner in writing as soon as practicable if a party applies to VCAT for review of my decision.<sup>9</sup>

34. If a review application is made to VCAT, my decision will be subject to any VCAT determination.

### **Third party review rights**

35. While I have decided to release the personal affairs information of the birth parent in the document, given the passage of time and the inability of the Agency to contact her to seek her views on disclosure of her personal affairs information, I am satisfied the requirement for me to notify her of my decision under section 49P(5) is not practicable in the circumstances.

### **When this decision takes effect**

36. My decision does not take effect until the Agency's 14 day review period expires.

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<sup>6</sup> The Applicant in section 50(1)(b) and the Agency in section 50(3D).

<sup>7</sup> Section 52(5).

<sup>8</sup> Section 52(9).

<sup>9</sup> Sections 50(3F) and (3FA).