

Notice of Decision and Reasons for Decision

Applicant:	'FJ5'
Agency:	Eastern Health
Decision date:	3 October 2023
Exemptions considered:	Sections 30(1), 33(1)
Citation:	'FJ5' and Eastern Health (Freedom of Information) [2023] VICmr 91 (3 October 2023)

FREEDOM OF INFORMATION – medical records of deceased family member – direct contact details of third parties – observations made by staff – opinion of staff – third party consent to disclose 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 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 decided to release further information in the documents where I am not satisfied it is exempt from release under sections 30(1) or 33(1). However, I have decided that some information is to remain exempt from release under section 33(1).

The documents are to be released to the Applicant in full and in part in accordance with the Schedule of Documents in **Annexure 1**.

My reasons for decision follow.

Rachel Dixon
Acting Information Commissioner

3 October 2023

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency seeking access to their deceased [family member]'s medical records.
2. The Agency identified 14 documents in response to the Applicant's request and released the documents in part with information exempted 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 a review of the Agency's decision under section 49A(1).
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 information received from the Applicant and the Agency.
7. Parliament's intention is that the FOI Act must be interpreted to further the object of the FOI Act, including facilitating and promoting the disclosure of information in a timely manner and at the lowest reasonable cost.
8. In undertaking my review, I have had regard to the object of the FOI Act to promote access to information, limited only by exceptions and exemptions that are necessary to protect essential public interests, privacy and business affairs.
9. In conducting a review, I make a new or 'fresh decision'¹ that is the 'correct or preferable decision'.² 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 workings of an agency

10. A document or information will be exempt under section 30(1) if the following three requirements are met:
 - (a) the document or information is matter in the nature of:
 - (i) opinion, advice or recommendations prepared by an Agency officer or Minister;
or

¹ Section 49P.

² *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577 at [591].

- (ii) consultation or deliberation that has taken place between officers or Ministers; and
 - (b) the matter was created during the deliberative process an agency, Minister, or the government; and
 - (c) disclosure of the matter would be contrary to the public interest.
11. The exemption does not apply to purely factual material in a document.³

First requirement

12. 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.
13. 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 or information would disclose matter of that nature.⁴
14. The documents contain observations made by staff in relation to the Applicant and their family, which I am satisfied is opinion. Therefore, the first requirement is met.

Second requirement

15. The second requirement is that the opinion must have been created in a 'deliberative process' in relation to the functions of the Agency.
16. The term 'deliberative process' is interpreted broadly and includes any of the processes undertaken by an agency in relation to its functions.⁵
17. I am satisfied the opinion was recorded by Agency officers during and for the purposes of the deliberative processes involved in providing healthcare services to a patient. Accordingly, the second requirement is met.

Third requirement

18. The third requirement is that disclosing this information must be contrary to the public interest.
19. I must consider all relevant facts and circumstances, remaining mindful that the intention of the FOI Act is to promote the disclosure of information.
20. The following factors are generally considered when deciding if disclosing a document or information would be contrary to the public interest:⁶

³ Section 30(3).

⁴ *Mildenhall v Department of Education* (1998) 14 VAR 87.

⁵ *Re Waterford v Department of Treasury (No. 2)* (1984) 1 AAR 1 at [58].

⁶ *Hulls v Victorian Casino & Gaming Authority* (1989) 12 VAR 482 at [488]; *Re Howard v Treasurer (Cth)* (1985) 7 ALD 626 at [634] – [635]; *Friends of Mallacoota Inc v Department of Planning and Community Development* [2011] VCAT 1889 at [51].

- (a) the right of every person to access documents under the FOI Act;
- (b) the sensitivity of the document;
- (c) the context and significance of the document;
- (d) the stage of the matters raised in the document at the time the document was created;
- (e) whether disclosing the information or document would promote a public interest; and
- (f) whether disclosing the document or information would:
 - (i) inhibit the frankness, candour or independence of Agency officers;
 - (ii) cause confusion or unnecessary debate;
 - (iii) give a part explanation rather than a complete explanation for what has occurred;
 - (iv) lead to misinterpretation;
 - (v) inhibit the recording of similar information in future;
 - (vi) negatively impact the making of informed and considered decisions in future;
 - (vii) the impact of a disclosing a draft or preliminary information that does not represent a final position or decision;
 - (viii) prejudice decision making processes.

21. The Agency decided that disclosing some information would be contrary to the public interest because it considers the information is highly sensitive and that disclosing the information would:

... likely have a discouraging effect on clinical staff from documenting detailed information in their clinician notes, and providing their frank and honest opinions and reviews of patient's clinical care in the future. Consequently, this would hinder their ability to express their thoughts and opinions openly, and frankly with candour, which is contrary to best clinical practice and optimal patient care. Allowing this information to be disclosed to the Applicant would not serve the public's interest, as it could potentially discourage clinical staff from documenting similar occurrences in the future, impacting on quality improvement in health care provision.

22. I do not accept the information, which records subjective observations of staff regarding the behaviour of the Applicant and their family, is highly sensitive in nature. While there is potential that the Applicant will not agree with the observations that were recorded, in my view, the Applicant and other persons identified in the documents are capable of understanding that such observations are subjective to the observer and may not necessarily reflect their own perspective.
23. I do not agree that disclosing this information in this instance will deter medical staff from discharging their professional and ethical obligations to provide and record their opinions and subjective comments in the future, or from recording detailed opinions or advice in relation to the health and well-being of patients in their care.

24. Given the documents concern the Applicant's deceased [family member], I have placed weight on the public interest in releasing information to a deceased person's family unless there are any significant reasons why it would not be appropriate in the circumstances. In this matter, I do not consider there to be any significant reasons to not disclose the information.
25. Accordingly, I am not satisfied that releasing the information to the Applicant would be contrary to the public interest and it is not exempt from release under section 30(1).

Section 33(1) – Unreasonable release of personal information

26. A document or information will be exempt under section 33(1) if two requirements are met:
 - (a) the document contains information relating to the 'personal affairs information of another person (a **third party**);⁷ and
 - (b) disclosing that information would be unreasonable in the circumstances.

First requirement – do the documents contain personal affairs information of another person?

27. 'Personal affairs' information means any information that identifies any person, their address or location, or from which this information may be reasonably determined.⁸ This includes information that is capable of directly or indirectly identifying a third party.⁹
28. Even where an applicant claims to know the identity of a third party, disclosing the third party's personal affairs information may still be unreasonable in the circumstances.¹⁰
29. The personal affairs information exempted by the Agency includes the direct contact details of staff, health-related information of a third party (not the Applicant's [family member]), and observations made by staff regarding the conduct of a third party.
30. I am satisfied this information is 'personal affairs' information and the first requirement is met.

Second requirement – would it be unreasonable to disclose the information in the circumstances of this matter?

31. Deciding whether disclosure is 'unreasonable' involves balancing the public interest in disclosing information against the personal interest in protecting an individual's privacy.
32. Whether it would be unreasonable to disclose someone's personal affairs will vary from case to case' and involves carefully weighing matters that are 'relevant, logic and probative'.¹¹
33. I have considered the following factors:

⁷ Sections 33(1) and 33(2).

⁸ Section 33(9).

⁹ *O'Sullivan v Department of Health and Community Services (No 2)* [1995] 9 VAR 1 at [14]; *Beauchamp v Department of Education* [2006] VCAT 1653 at [42].

¹⁰ *AB v Department of Education and Early Childhood Development* [2011] VCAT 1263 at [58]; *Akers v Victoria Police* [2003] VCAT 397 at [41].

¹¹ *Victoria Police v Marke* [2008] VSCA 218 at [76] and [98].

- (a) the nature of the personal affairs information;
- (b) the circumstances in which the information was obtained;
- (c) the Applicant's interest in the information and their purpose for seeking the information;
- (d) whether any public interest would be promoted by releasing the information;
- (e) the likelihood of the Applicant disclosing the information if it is released;
- (f) whether the third parties objected, or would be likely to object, to the release of the information; and
- (g) whether disclosing the information would or would be reasonably likely to endanger the life or physical safety of any person.¹²

34. I am satisfied it would be unreasonable to disclose the direct contact details of third parties for the following reasons:

- (a) The Applicant can understand the documents without releasing the contact details of third parties;
- (b) As the names of staff have been released, disclosing the direct contact details will not add any meaningful value to the Applicant's understanding of the involvement of those staff in the care of their [family member].
- (c) Disclosing the information will not promote a public interest.
- (d) There is no information before me regarding the reviews of the third parties whose contact details are included in the documents. In any case, I consider they would be reasonably likely to object to the release of their contact details, as there are no restrictions on an applicant's use of documents when disclosed under FOI. The relevant third parties would likely be concerned that their direct contact details could be disseminated more broadly.

35. I am not satisfied it would be unreasonable to disclose most personal affairs information relating to another third party in the circumstances of this matter for the following reasons:

- (a) The Agency consulted with the third party to obtain their views on disclosure of their personal affairs information and provided me with a copy of its consultation record. On review of that record, I am satisfied the third party consented to the disclosure of their personal affairs information to the Applicant. As the relevant third party has consented to the disclosure of their personal affairs information, I consider it would not be unreasonable to disclose most of the information that relates to them.
- (b) The personal affairs information also relates to the Applicant's [family member].

36. However, there is some health-related information concerning that third party that they may not be aware was recorded in the documents. Given the sensitivity of this information, I am

¹² Section 33(2A).

satisfied it would be unreasonable to disclose that information to the Applicant out of concern the third party may not have been aware that it was recorded, and they may not want it disclosed to the Applicant.

37. Accordingly, I am satisfied that the documents contain personal affairs information that would be unreasonable to disclose in the circumstances and is exempt from release under section 33(1).
38. However, I have also decided to release further information where I am not satisfied it would be unreasonable to disclose in the circumstances of this matter.

Section 25 – Deletion of exempt information

39. 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 an edited copy.
40. Determining whether it is practicable to edit a document involves consideration of the effort and editing involved in making the deletions ‘from a resources point of view’¹³ and the effectiveness of the deletions. A document is not required to be edited if it would render the document meaningless or unintelligible.¹⁴
41. I am satisfied it is practicable to provide edited copies of the documents with exempt information deleted because it would not require substantial time and effort, and the edited documents would retain meaning.

Conclusion

42. On the information before me, I am satisfied certain information in the documents is exempt from release under section 33(1).
43. As I am satisfied it is practicable to provide the Applicant with edited copy of the documents with exempt information deleted in accordance with section 25, access is granted either in part or in full in accordance with the Schedule of Documents in **Annexure 1**.

Timeframe to seek review of my decision

44. If either party to this review is not satisfied with my decision, they can apply to the Victorian Civil and Administrative Tribunal (**VCAT**) for it to be reviewed.¹⁵
45. The Applicant has up to 60 days to apply to VCAT from the date they are given this decision.¹⁶
46. The Agency has up to 14 days to apply to VCAT from the date it is given this decision.¹⁷

¹³ *Mickelborough v Victoria Police (General)* [2009] VCAT 2786 at [31].

¹⁴ *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].

¹⁵ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

¹⁶ Section 52(5).

¹⁷ Section 52(9).

47. Information about how to apply to VCAT is available online at www.vcat.vic.gov.au.
48. VCAT may be contacted by email at admin@vcat.vic.gov.au or by telephone on 1300 018 228.
49. The Agency must notify the Information Commissioner in writing as soon as practicable if either party applies to VCAT for a review of my decision.¹⁸

Third party review rights

50. As the third party whose information I have decided to release has consented to disclosure of their personal affairs information, they do not have a right to seek review by VCAT of my decision.¹⁹

When this decision takes effect

51. 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.
52. If my decision is not subject to review by VCAT, the Agency is required to release the documents to the Applicant in accordance with the Schedule of Documents in **Annexure 1** upon expiry of its 14-day review period.

¹⁸ Sections 50(3F) and 50(3FA).

¹⁹ Section 50(3AC).

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
1.	[date]	Patient Transfer Discharge Summary	11	Released in part Section 33(1)	Release in part Section 33(1) No further information is to be released.	Section 33(1): I am satisfied it would be unreasonable to disclose direct contact details of third parties for the reasons set out in my decision, above. Section 25: The Agency has already released an edited copy of this document with exempt information deleted. No further information in this document is to be released.
2.	[date]	Total Care Progress Note	2	Released in part Section 33(1)	Release in part Section 33(1) No further information is to be released.	Section 33(1): The information exempted by the Agency is sensitive health-related information about a third party. I am satisfied it would be unreasonable to disclose this information for the reasons set out in my decision, above. Section 25: See comments for Document 1.
3.	[date]	[Redacted] Inpatient Medical Admission	6	Released in part Section 30(1)	Release in full	Section 30(1): I am not satisfied that information in this document is exempt from release under section 30(1) for the reasons set out in my decision, above. This document is to be released in full.

Document No.	Date of Document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
4.	[date]	[Redacted] Consult Service Referral Form	3	Released in part Section 33(1)	Release in part Section 33(1) No further information is to be released.	Section 33(1): The exempted information is mobile telephone numbers. See comments for Document 1.
5.	[date]	[Medical record]	3	Released in part Section 33(1)	Release in part Section 33(1) No further information is to be released.	Section 33(1): See comments for Document 1.
6.	[date]	Referral for [Redacted]	1	Released in part Section 33(1)	Release in part Section 33(1) No further information is to be released.	Section 33(1): See comments for Document 1.
7.	[date]	Statement of Identification	1	Released in part Section 33(1)	Release in part Section 33(1) No further information is to be released.	Section 33(1): See comments for Document 1.
8.	[date]	E-Medical Deposition Form	2	Released in part Section 33(1)	Release in part Section 33(1) No further information is to be released.	Section 33(1): See comments for Document 1.

Document No.	Date of Document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
9.	Various	Allied Health documentation	3	Released in part Section 33(1)	Release in part Section 33(1) No further information is to be released.	Section 33(1): See comments for Document 1.
10.	[date]	Allied Health documentation	1	Released in part Section 33(1)	Release in part Section 33(1) No further information is to be released.	Section 33(1): See comments for Document 1.
11.	[date range]	Allied Health documentation	10	Released in part Section 33(1)	Release in part Section 33(1) No further information is to be released.	Section 33(1): See comments for Document 1.
12.	[date range]	Doctor Progress Notes	5	Released in part Section 30(1)	Release in full	Section 30(1): See comments for Document 3.
13.	[date range]	Nursing documentation	2	Released in part Section 33(1)	Release in part Section 33(1) No further information is to be released.	Section 33(1): See comments for Document 1.
14.	[date range]	Nursing documentation	2	Release in part Sections 30(1), 33(1)	Release in full	Section 30(1): See comments for Document 3.

Document No.	Date of Document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
						<p>Section 33(1): This information records observations made by a nurse concerning the Applicant's [family member] and a third party. I am satisfied it would not be unreasonable to disclose this information in the circumstances for the reasons set out in my decision, above.</p>