Office of the Victorian Information Commissioner

t 1300 00 6842
e enquiries@ovic.vic.gov.au
w ovic.vic.gov.au

PO Box 24274
Melbourne Victoria 3001

Notice of Decision and Reasons for Decision

Applicant:	*'FJ8'*
Agency:	Eastern Health
Decision date:	4 August 2023
Exemptions considered:	Sections 30(1), 35(1)(b)
Citation:	*'FJ8' and Eastern Health* (Freedom of Information) [2023] VICmr 94 (4 August 2023)

FREEDOM OF INFORMATION – Root cause analysis report – review of clinical incident – contrary to the public interest

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 from release under section 30(1). However, I am not satisfied information is exempt from release under section 35(1)(b) and I have determined further information can be released to the Applicant.

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

The Schedule of Documents in **Annexure 1** sets out my decision in relation to each document.

A marked-up copy of Document 3, indicating exempt or irrelevant information in accordance with my decision, has been provided to the Agency.

My reasons for decision follow.

Sven Bluemmel
Information Commissioner

4 August 2023

Reasons for Decision

Background to review

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

> A copy of the in-depth case review that was recently completed into the death of my [spouse] along with the medical records from [specified hospitals].

2. The Agency identified three documents falling within the terms of the Applicant's request and granted access to two documents in part under section 33(1) and refused access to one document in full under sections 30(1) and 35(1)(b). The Agency's decision letter sets out the reasons for its decision.

Review application

3. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.

4. In their review application, the Applicant advised they are not interested in 'names or personal information'. Accordingly, names and other personal affairs information the Agency exempted from release under section 33(1) will not be reviewed, and my review will be confined to information exempted by the Agency under sections 30(1) and 35(1)(b) located in Document 3.

5. I have examined a copy of Document 3 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. I have considered all communications and submissions received from the parties.

8. 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.

9. 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.

10. 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 30(1) – Internal working documents

11. 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 consultation or deliberation that has taken place between officers, Ministers or an officer and a Minister; and

    (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.

12. The exemption does not apply to purely factual material in a document.[2]

13. The Agency applied section 30(1) to exempt in full, a root cause analysis (**RCA**) report. The Department of Health website provides the following information about RCA reports:

> Root cause analysis (RCA) is a process analysis used to identify the underlying causes of system failures. It provides the information needed to solve problems and address these failures.
>
> Clinical risk managers and other healthcare personnel use RCA to help them find answers to the questions posed by serious incidents. They investigate what happened, why it occurred, and what can be done to prevent it from happening again.[3]

14. Accordingly, an RCA review is a process that seeks to identify why a serious medical incident involving a patient occurred, with a view to ensuring a similar event does not reoccur, or the risk of a similar event occurring is minimised. Such reviews are conducted so as not to attribute blame on any person or persons, but rather to serve a broader purpose of identifying any systemic failures in medical care or services provided by a hospital to a patient that need to be addressed.

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

15. 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.

16. 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 would disclose matter of that nature.[4]

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[2] Section 30(3).
[3] Department of Health, *Clinical incident investigations – root cause analysis* (Web Page, 11 November 2021), available at https://www.health.vic.gov.au/quality-safety-service/clinical-incident-investigations-root-cause-analysis.
[4] *Mildenhall v Department of Education* (1998) 14 VAR 87.

17. Having considered the content and context in which the document was created, I am satisfied it contains information in the nature of opinion and recommendation prepared by Agency officers.

Was the document 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?

18. The term 'deliberative process' is interpreted broadly and includes any of the processes of deliberation or consideration involved in the functions of an agency, Minister or government.[5]

19. In *Re Waterford and Department of Treasury (No.2)*,[6] the former Victorian 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.

20. I am satisfied the document was made in the course of, and for the purposes of, the Agency's deliberative processes. Specifically, in reviewing a clinical incident for the purpose of identifying any systemic failures in medical care or services provided by a hospital to a patient that need to be addressed.

Would disclosure of the document be contrary to the public interest?

21. In deciding if release is contrary to the public interest, I must consider all relevant facts and circumstances remaining mindful that the object of the FOI Act is to facilitate and promote the disclosure of information.

22. In deciding whether the information exempted by the Agency would be contrary to the public interest, I have given weight to the following relevant factors:[7]

    (a) the right of every person to gain access to 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 document;

    (c) the stage of a decision or a process being undertaken at the time the communications were made;

    (d) whether disclosure of the document 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 document would give merely a part explanation, rather than a complete explanation for the taking of a particular decision or the outcome of a

[5] *Brog v Department of Premier and Cabinet* (1989) 3 VAR 201 at [208].
[6] [1984] AATA 67; (1984) 5 ALD 588; 1 AAR 1 at [58].
[7] *Hulls v Victorian Casino and Gambling Authority* (1998) 12 VAR 483.

process, which the Agency would not otherwise be able to explain upon disclosure of the documents;

(f) the impact of disclosing a document that does not clearly or accurately represent a final position or decision reached by the Agency at the conclusion of a decision or 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.

23. The Agency made the following submission, setting out why it considers disclosure of the RCA report would be contrary to the public interest:

(a) The RCA Report is a strictly confidential internal document. It was created through a strictly confidential internal process, for a limited internal audience. It was not prepared for wide-spread dissemination within Eastern Health or for disclosure to the public or the Applicant, or [the Applicant's] representatives.

(b) The RCA Report does not form part of the Applicant's medical records. It contains some information taken from those medical records, but clinical information contained in the RCA Report is of a different nature to the medical records, because it is recorded in a different way and for a different purpose and audience, and is coupled with the opinions and deliberations of employees.

(c) The RCA Report goes beyond issues relating to the Applicant's treatment, to consider broader systemic or operational issues.

(d) The RCA is of a highly sensitive nature.

(e) The usefulness of the RCA process is heavily dependent upon the full and frank participation of the RCA team members who conduct that process, and the full and frank participation of the employees who are interviewed as part of that process. The participation is, in turn, dependent upon RCA team members' and interviewees' trust in the confidentiality process.

If it becomes known that RCA Reports may be partially of fully disclosed under the Act, it is highly likely that some RCA team members will be impaired in their full and frank participation in future RCAs and some interviewees will be deterred from participating as fully and frankly in future RCAs.

This would be detrimental to the quality review process, which would undermine the quality improvement objectives of public health services, which are aimed at improving the safety of patients, employees and visitors.

(f) The RCA report was prepared for the purpose of a quality and improvement process that involves the internal review of clinical incidents for the purpose of clinical risk and safety management.

(g) The RCA report does not provide a full explanation of the matters to which it relates. Part of the RCA Report could be misconstrued as asserting causes, or allocating blame. Accordingly, it is very likely that the RCA Report would be misleading if released.

(h) The RCA Report does not confirm whether or not the recommendations and learnings have been implemented. It is contrary to public interest to disclose possibilities

considered but not ultimately adopted, because such disclosure is likely to lead to confusion of ill-informed debate.

(i) If released under the Act, there are no restrictions on how the RCA Report may be used, or who it may be disclosed too.

24. I agree with the Agency's submission that the document contains sensitive information relating to an investigation into a clinical event arising from a patient's medical treatment and care received from a public hospital.

25. I accept when serious clinical incidents occur that result in serious harm to, or the death of a patient while in the care of a public hospital, there is a public interest in those persons who are directly impacted being informed of the cause of the incident. Public knowledge of these events allows for informed decision making by patients regarding medical treatment and care and ensures accountability and transparency in the public health care system.

26. However, this public interest must be balanced against the potential for the processes employed to investigate serious clinical incidents to be undermined by the release of findings under the FOI Act. Given such investigations and their findings promote continuous improvement in practices, policies and procedures within the public health system, I accept it is essential such processes are as thorough and detailed as possible.

27. I accept RCA panel members may be less willing to record fulsome and detailed advice and recommendations, for example, where a system or process failure is identified as part of a clinical review, if such reports were to be routinely released under FOI. Further, the implications of this would undermine the robustness of the Agency's investigative processes into these types of serious events, which would undermine the opportunity for the Agency to identify the cause of a serious clinical incident and any necessary action required to avoid the reoccurrence of a similar event in the future.

28. It is essential for the public to have confidence that when a serious event occurs in a public hospital, it will be thoroughly investigated and that any appropriate measures identified are put in place to remove or mitigate the risk of a similar event occurring. In my view, this is an essential public interest of the kind envisaged by Parliament and enshrined in the object of the FOI Act in providing for exemptions that apply to information to which access may be refused.[8]

29. Accordingly, I have determined disclosure of certain information in the document would be contrary to the public interest. Such information includes, for example, the panel's findings, learning and recommendations, which I am satisfied is exempt from release under section 30(1).

30. I have also considered the Applicant's genuine interest in seeking access to the document. I consider there is a strong public interest in providing patients, or their family members, with information about what happened, particular where a patient has suffered an adverse clinical event.

31. I consider it would not be contrary to the public interest to disclose the description of the clinical event and the outcome for the patient and the timeline of events. Although the

[8] Section 3 of the FOI Act.

purpose of an RCA report is to make recommendations following a review of a clinical incident, I consider the description of the clinical event and the timeline of the event is predominantly factual in nature. I consider such information will continue to be recorded by healthcare professionals as part of their professional responsibilities and obligations, irrespective of disclosure under the FOI Act in this instance.

32. As such, I am satisfied this information is not exempt from release under section 30(1).

33. My decision on section 30(1) is set out in the Schedule of Documents in **Annexure 1**.

Section 35(1)(b) – Information obtained in confidence

34. A document is exempt under section 35(1)(b) if two conditions are satisfied:

    (a) disclosure would divulge information or matter communicated in confidence by or on behalf of a person or a government to an agency or a Minister; and

    (b) disclosure would be contrary to the public interest as it would be reasonably likely to impair the ability of an agency or a Minister to obtain similar information in the future.

35. The Agency also exempted the RCA report in full under section 35(1)(b).

Was the information obtained in confidence?

36. Whether information communicated by an individual to an agency was communicated in confidence is a question of fact.[9]

37. In doing so, it is necessary to consider the position from the perspective of the communicator, noting confidentiality can be expressed or implied from the circumstances of a matter.[10]

38. Generally, section 35(1)(b) only applies to information communicated to an agency from an outside source, rather than from an officer within an agency. However, the Victorian Civil and Administrative Tribunal (**VCA**T) has accepted in certain circumstances, that section 35(1)(b) may apply to confidential information communicated to an agency by its own officers.[11]

39. The Agency submits the document contains information provided by employees in interviews conducted by the RCA team members and that such information was provided in strict confidence.

40. Having considered the content and context of the document, I am satisfied it contains information that was communicated to the Agency in confidence by its own officers in circumstances where confidentiality can be reasonably implied.

Would disclosure of the information be contrary to the public interest?

41. Section 35(1)(b) also requires I consider whether the Agency would be impaired from obtaining similar information in the future if the information were to be disclosed under the

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[9] *Ryder v Booth* [1985] VR 869 at [883]; *XYZ v Victoria Police* [2010] VCAT 255 at [264].
[10] *XYZ v Victoria Police* [2010] VCAT 255 at [265].
[11] *Sportsbet v Department of Justice* [2010] VCAT 8 at [71]-[78]; *XYZ v Victoria Police* [2010] VCAT 255 at [287]-[288]; *Birnbauer v Inner and Eastern Health Care Network* (1999) 16 VAR 9 at [15].

FOI Act. This involves considering whether others in the position of the communicator would be reasonably likely to be inhibited or deterred from providing similar information to the Agency in the future should the information be disclosed.

42. The public interest test is section 35(1)(b) is narrow, in that it is directed toward the impact release would have on an agency's ability to obtain the same type of information in the future. I note the exemption will not be made out if an agency's impairment goes no further than showing potential communicators of the information may be less candid than they would otherwise have been.[12]

43. The Agency made the following submission outlining why it considers disclosure of the document will impair its ability to obtain similar information in the future for the following reasons:

    (a) The usefulness of the RCA process is heavily dependent upon the full and frank participation of the RCA team members who conduct that process and the full and frank participation of the employees who are interviewed as part of the process.

    (b) That participation is, in turn, dependent upon the RCA team members' and interviewees' trust in the confidentiality of the process.

    (c) If it becomes known that RCA reports may be partially or fully disclosed under the Act, it is highly likely that some RCA team members will be impaired in their full and frank participation in future RCAs and some interviewees will be deterred from participating as fully and frankly in future RCAs.

    (d) This impairment and deterrence would be detrimental to the quality review process, which would undermine the quality improvement objectives of public health services, which are aimed at improving the safety of patients, employees and visitors.

44. I accept healthcare professionals who provide information during an investigation into a clinical incident may be less willing to provide fulsome and detailed advice as part of a clinical review if such reports were to be routinely released under FOI.

45. I consider RCA investigations of this nature are not uncommon and rely on the participation of agency officers who are almost always provided with assurances of confidentiality in exchange for information to inform the investigation.

46. However, I have placed weight on the fact that the document does not directly reveal the specific information provided by the third parties. The document is written in such a way that it protects the confidentiality of individuals, such that their views or recollection of events are communicated from a broad or general perspective, rather than recording a specific opinion provided by an individual.

47. I consider healthcare workers are obliged to provide descriptions of events that occurred during the treatment of their patients and participate in clinical incident investigations with open disclosure and in accordance with their professional duties and responsibilities.

[12] *Smeaton v Victorian WorkCover Authority* [2012] VCAT 1549 at [69], approving *Birnbauer v Inner and Eastern Health Care Network* [1999] 16 VAR 9.

48. I acknowledge there is a fine balance between encouraging open and fulsome participation in an investigation in exchange for assuring a participant's confidentiality with the need to synthesise and report on evidence obtained to make appropriate findings and recommendations. However, on careful consideration, I consider the Agency will not be impaired from obtaining similar information in future, should the document be released in this instance under FOI.

49. Accordingly, I am not satisfied the document is exempt from release under section 35(1)(b).

50. The Schedule of Documents in **Annexure 1** outlines my decision in relation to section 35(1)(b).

Section 25 – Deletion of exempt or irrelevant information

51. 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.

52. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'[13] 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.[14]

53. I note the Applicant does not seek access to personal affairs information. Accordingly, personal affairs information in the documents, which includes names, position titles, telephone numbers and email addresses, are to remain deleted from the document. Such information is irrelevant information for the purpose of my review.

54. I have considered the effect of deleting irrelevant and exempt information from the documents. In my view, it is practicable for the Agency to delete the irrelevant and exempt information, because it would not require substantial time and effort, and the edited documents would retain meaning.

Conclusion

55. On the information before me, I am satisfied certain information in Document 3 is exempt from release under section 30(1). However, I am not satisfied information is exempt from release under section 35(1)(b). Accordingly, I have determined to release further information to the Applicant where I am satisfied it is not exempt from release.

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

57. The Schedule of Documents in **Annexure 1** sets out my decision in relation to each document.

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[13] *Mickelburough 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].
[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].

58. A marked-up copy of Document 3, indicating exempt or irrelevant information in accordance with my decision, has been provided to the Agency.

Review rights

59. If either party to this review is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.[15]

60. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.[16]

61. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.[17]

62. 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.

63. 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.[18]

Third party review rights

64. As I have determined to release information that was claimed exempt under section 35(1)(b), if practicable, I am required to notify those persons of their right to seek review by VCAT of my decision within 60 days from the date they are given notice.[19]

65. In this case, I am satisfied it would not be practicable to notify the relevant third parties of their review rights because:

    (a) the information I have determined to disclose does not directly identity the third parties; and

    (b) the document is written in a way that does not identity what particular information a third party has provided, for example, there are no direct quotes and references to information provided by specific third parties.

When this decision takes effect

66. 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.

[15] The Applicant in section 50(1)(b) and the Agency in section 50(3D).
[16] Section 52(5).
[17] Section 52(9).
[18] Sections 50(3F) and 50(3FA).
[19] Sections 49P(5), 50(3AB) and 52(3).

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
1.	[Date]	Death certificate	7	**Released in part** Section 33(1)	**Release in part** Section 25 No further information is to be released.	**Section 25:** The information that the Agency exempted from release in this document is an email address and telephone number. As the Applicant does not seek access to this information, it is to remain deleted from the document in accordance with section 25. Accordingly, no further information in this document is to be released.
2.	[Date]	ICU Progress note	1	**Released in part** Section 33(1)	**Release in part** Section 25 No further information is to be released.	**Section 25:** The information that the Agency exempted from release in this document is a telephone number. As the Applicant does not seek access to this information, it is to remain deleted from the document in accordance with section 25. Accordingly, no further information in this document is to be released.
3.	[Date]	Root cause analysis report	21	**Refused in full** Sections 30(1), 35(1)(b)	**Release in part** Sections 30(1), 25 A marked-copy of this document has been provided to the Agency indicating	**Section 30(1):** I am satisfied certain information in the document is exempt from release under section 30(1) for the reasons provided in the Notice of Decision, above. **Section 35(1)(b):** I am not satisfied the document is exempt from release under

Document No.	Date of Document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
					exempt and irrelevant information	section 35(1)(b) for the reasons provided in the Notice of Decision above. **Section 25:** I am satisfied the document contains personal affairs information of third parties, such as names and position titles. As the Applicant does not seek access to this information, it is to remain deleted from the document in accordance with section 25. I am satisfied it is practicable to provide the Applicant with an edited copy of this document with exempt and irrelevant information deleted in accordance with section 25.