

Notice of Decision and Reasons for Decision

Applicant:	'FK2'
Agency:	Mercy Hospitals Victoria Ltd
Decision date:	23 November 2023
Exemptions considered:	Sections 33(1), 35(1)(b)
Citation:	'FK2' and Mercy Hospitals Victoria Ltd (Freedom of Information) [2023] VICmr 96 (23 November 2023)

FREEDOM OF INFORMATION – medical records – health records – deceased family member – next of kin – personal affairs information of third parties – unreasonable disclosure - information obtained in confidence – disclosure 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 is the same as the Agency's decision.

I am satisfied the document is exempt from release under sections 33(1) and 35(1)(b).

As I am satisfied it is not practicable to provide the Applicant with an edited copy of the document with exempt information deleted in accordance with section 25, I have determined to refuse access to the document in full.

My reasons for decision follow.

Shantelle Ryan

Acting Public Access Deputy Commissioner

23 November 2023

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency seeking access to the medical records of a deceased family member from a particular site of the Agency.
2. The Applicant advised they were seeking access to enable the deceased family member's previous treating doctor to review the records to then provide an Affidavit of Testamentary Capacity for their then patient in [month and year].
3. The Agency identified medical records totalling 432 pages falling within the terms of the Applicant's request and refused access to the document in full under sections 33(1) and 35(1)(b). The Agency's decision letter sets out the reasons for its decision.
4. In its decision, the Agency advised that prior to their death, the family member to whom the information relates had made repeated requests for confidentiality to be maintained and those requests are documented in the medical records, specifically that no information be provided to their family or friends.

Review application

5. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
6. I have examined copies of the medical records subject to review.
7. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
8. I have considered all communications and submissions received from the parties. This includes background information provided by the Applicant and their representative about the purpose of the request. I note the Applicant's advice that they seek for the medical records to be accessible only to the named treating doctor for the purpose of the doctor preparing a required Affidavit of Testamentary Capacity to enable the probate of the deceased family member's informal will.
9. 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.
10. 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.

Review of exemptions

Section 33(1) – Documents affecting personal privacy of third parties

11. 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 (including a deceased person) other than the Applicant (a **third party**);¹ and
- (b) such disclosure would be ‘unreasonable’.

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

- 12. 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 this may be reasonably determined.²
- 13. A document will disclose a third party’s personal affairs information if it is capable, either directly or indirectly, of identifying that person.³ As the nature of disclosure under the FOI Act is unrestricted and unconditional, this is to be interpreted by reference to the capacity of any member of the public to identify a third party.
- 14. Even where an applicant claims to know the identity of a third party, disclosure of their personal affairs information may still be unreasonable in the circumstances.⁴
- 15. The document contains the names, contact details, signatures, description of events and information regarding the health, medical treatment, personal history and personal relationships of individuals other than the Applicant. I consider this information and the context in which it was obtained is inherently personal to the patient receiving care.

Would disclosure of the personal affairs information be unreasonable?

- 16. The concept of ‘unreasonable disclosure’ involves balancing the public interest in the disclosure of official information with the personal interest in privacy in the particular circumstances of a matter.
- 17. In *Victoria Police v Marke*,⁵ the Victorian Court of Appeal held there is ‘no absolute bar to providing access to documents which relate to the personal affairs of others’. Further, the exemption under section 33(1) ‘arises only in cases of unreasonable disclosure’ and ‘[w]hat amounts to an unreasonable disclosure of someone’s personal affairs will necessarily vary from case to case’.⁶ The Court further held, ‘[t]he protection of privacy, which lies at the heart of [section] 33(1), is an important right that the FOI Act properly protects. However, an individual’s privacy can be invaded by a lesser or greater degree’.⁷

¹ Sections 33(1) and 33(2).

² Section 33(9).

³ *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].

⁴ *AB v Department of Education and Early Childhood Development* [2011] VCAT 1263 at [58]; *Akers v Victoria Police* [2003] VCAT 397 at [41].

⁵ [2008] VSCA 218 at [76].

⁶ *Ibid.*

⁷ *Ibid* at [79].

18. Section 33(2B) requires that, in deciding whether disclosure under the FOI Act would involve the unreasonable disclosure of information relating to the personal affairs of any person (including a deceased person), the Agency must:

- (a) notify the person who is the subject of that information (or if that person is deceased, that person's next of kin) that the agency has received a request for access to the document;
- (b) seek that person's view as to whether disclosure of the document should occur; and
- (c) state that if the person consents to disclosure of the document, or disclosure subject to deletion of information relating to the personal affairs of the person, the person is not entitled to apply to the tribunal for review of a decision to grant access to that document.

19. The term 'next of kin' is not defined in the FOI Act. Section 3 of the *Human Tissues Act 1982* (Vic) provides the following definition:

"senior available next of kin" means –

...

(b) in relation to any other deceased person –

- i. where the person, immediately before the person's death, had a spouse or domestic partner and that spouse or domestic partner is available – the spouse or domestic partner;
- ii. where the person, immediately before the person's death, did not have a spouse or domestic partner or the spouse or domestic partner is not available – a son or daughter of the person who has attained the age of 18 years and who is available;
- iii. where no person referred to in subparagraph (i) or (ii) is available but a parent of the person is available that parent; or
- iv. where no person referred to in subparagraph (i), (ii), or (iii) is available – a brother or sister of the person who has attained the age of eighteen years and is available.

20. In this instance, I accept the Applicant is the deceased person's next of kin.

21. In determining whether disclosure of the personal affairs information would be unreasonable in the circumstances, I have considered the following factors:

(a) The nature of the personal affairs information

The information is the medical records of the Applicant's deceased family member. The information was obtained by the Agency in the course of providing health services and medical treatment to the deceased individual. I consider the health and other information in the medical records to be highly sensitive and personal in nature.

While I acknowledge certain information in the documents is administrative in nature and could be considered less sensitive, I am satisfied there is a sufficient connection to the patient and their medical treatment.

(b) The circumstances in which the information was obtained

The information was collected by the Agency in relation to the provision of health services to the deceased individual. I accept that the medical treatment information of the Applicant's deceased family member was collected during the provision of medical care meaning it is inherently more sensitive.

(c) 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 under section 33(1).⁸

I acknowledge the Applicant has [context] interest in seeking access to their deceased family member's medical records and as a next of kin.

I further acknowledge the Applicant's submission [submission description].

The fact that the Applicant is the deceased person's next of kin is not a determinative factor as to whether release would be reasonable, rather it is a factor that must be weighed against other factors including the express or implied wishes of the individual to whom the personal affairs information relates.

(d) Whether any public interest would be promoted by release of the personal affairs information

With respect to whether a public interest would be promoted by disclosure, I acknowledge the public interest is served when disclosure of information held by an agency provides for accountability in the conduct of that agency's statutory or governmental functions.

In this case however I consider there is an overriding public interest in protecting the personal privacy of the third parties given the content of the information and the context in which the information was obtained and recorded by the Agency while providing care to the Applicant's family member.

(e) The likelihood of disclosure of information, if released.

As the FOI Act does not place any restrictions on an applicant's use or dissemination of documents obtained under FOI, this is to be interpreted by reference to the capacity of any member of the public to identify a third party.⁹

Accordingly, I have considered the likelihood of the personal affairs information in the document being further disseminated, if disclosed, and the effects broader disclosure of this information may have. Noting the Applicant's seeks access to provide the document to a named doctor, I consider further limited disclosure of the information would occur if it was released under the FOI Act.

⁸ *Victoria Police v Marke* [2008] VSCA 218 at [104].

⁹ *Ibid* at [68].

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

In its decision, the Agency stated that the patient made repeated requests for the information contained in their medical record to be treated with confidentiality, [further context redacted]. I have taken this into account and consider the primary person to whom the information relates would have objected to the release of their information.

- (g) Whether disclosure of the information would or would be reasonably likely to endanger the life or physical safety of any person¹⁰

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 consider whether the disclosure of the information would, or would be reasonably likely to, endanger the life or physical safety of any person.¹¹

I do not consider this to be a relevant factor in these circumstances.

22. On balancing the above factors, I am satisfied disclosure of sensitive and personal health and other personal affairs information in the medical records and the [context], as recorded in the document, mean release of such information would be unreasonable.
23. Accordingly, I am satisfied that disclosure of the personal affairs information contained in the medical records would be unreasonable in the circumstances and is exempt from release under section 33(1).

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

24. 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.

Was the information obtained in confidence?

25. Whether information communicated by an individual to an agency was communicated in confidence is a question of fact.¹²
26. 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.¹³

¹⁰ Section 33(2A).

¹¹ Section 33(2A).

¹² *Ryder v Booth* [1985] VR 869 at [883]; *XYZ v Victoria Police* [2010] VCAT 255 at [264].

¹³ *XYZ v Victoria Police* [2010] VCAT 255 at [265].

27. As noted above, the Agency's decision outlines that the person to whom the medical records relate made repeated requests for the information contained within to remain confidential [further context redacted].
28. Accordingly, I am satisfied the information was communicated in confidence to the Agency. I am also satisfied that the individual who provided the information had an expectation that confidentiality would be maintained.

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

29. Section 35(1)(b) also requires that I consider whether the Agency would be impaired from obtaining similar information in the future if the information were to be disclosed under the 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.
30. The public interest test in 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. For example, a person in the position of the communicator would be reasonably likely not to provide similar information to the Agency in the future.
31. There is an essential public interest in individuals being able to provide sensitive and confidential information about a patient to medical staff in a public health service. Where this occurs, members of the public should feel confident that information they provide to an agency, including their identity or any sensitive information, will be held in confidence by the agency.
32. Further, there is a public interest in patients being able to provide information about themselves to assist with their treatment. In its capacity as a healthcare provider, the Agency relies on individuals to voluntarily provide confidential information in order to diagnose and treat patients efficiently and effectively. It would be detrimental to the interests of patients if individuals were unable to speak freely and provide information to hospital and medical staff.
33. If individuals were aware that information they provide to a healthcare provider would be disclosed in response to an FOI request, they would be less likely to communicate similar information to the Agency in the future. In the context of the Agency, being a public hospital, the voluntary provision of sensitive information by patients and/or third parties is often vital to its ability to effectively discharge its healthcare functions in relation to the provision of medical treatment and patient care. I acknowledge the Applicant's [description] interest in seeking full access to their deceased family member's medical records. However, the public interest in third parties being able to provide confidential information to a healthcare provider outweighs the Applicant's personal interest in obtaining the information.
34. Accordingly, I am satisfied the information in the document is exempt from release under section 35(1)(b).

Section 25 – Deletion of exempt information

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.

36. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'¹⁴ 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 25.¹⁵
37. I have considered the effect of deleting exempt information from the document. In my view, it is not practicable for the Agency to delete the exempt information, because to do so would render the document meaningless.

Conclusion

38. On the information before me, I am satisfied the information in the document is exempt from release under sections 33(1) and 35(1)(b).
39. As I am satisfied it is not practicable to provide the Applicant with an edited copy of the document with exempt information deleted in accordance with section 25, access is refused in full.

Other matters

40. [Further context to decision redacted].

Review rights

41. If either party to this review is not satisfied with my decision, they are entitled to apply to the Victorian Civil and Administrative Tribunal (**VCAT**) for it to be reviewed.¹⁶
42. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹⁷
43. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹⁸
44. 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.
45. 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

¹⁴ *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].

¹⁵ *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].

¹⁶ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

¹⁷ Section 52(5).

¹⁸ Section 52(9).

¹⁹ Sections 50(3F) and 50(3FA).

When this decision takes effect

46. 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.