

Notice of Decision and Reasons for Decision

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| Applicant: | 'FL4' |
| Agency: | Eastern Health |
| Decision date: | 21 December 2023 |
| Sections considered: | 30(1), 35(1)(b) |
| Citation: | 'FL4' and Eastern Health (Freedom of Information) [2023] VICmr 107 (21 December 2023) |

FREEDOM OF INFORMATION – medical records – parent – child’s medical records – personal affairs information – information communicated in confidence

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 a document 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 information identified by the Agency in the document is exempt under sections 33(1) and 35(1)(b).

As my decision is the same as the Agency’s I am satisfied it is practicable to delete exempt information in the document. Access to the document is therefore granted in part.

This decision takes effect when the Agency’s 14 day review period expires.

When the review period expires, the Agency will provide you with the document with exempt information deleted in accordance with my decision.

My reasons for decision follow.

Please refer to the end of this decision for information about further review rights through the Victorian Civil and Administrative Tribunal.

Joanne Kummrow
Acting Information Commissioner

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency seeking access to their child's medical records relating to a presentation to the emergency department on [date].
2. The Agency identified one document falling within the terms of the request. The Agency decided to release the document in part, exempting certain information under sections 33(1) and 35(1)(b).
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. I have examined a copy of the document 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.

Review of exemptions

Section 30(1) – Internal working documents

11. Section 30(1) has three requirements:

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

- (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;
 - (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. While not claimed by the Agency, I have considered section 30(1) in relation to the first redaction made by the Agency in the document.
14. In my view the sentence amounts to the opinion, advice or recommendation of an Agency officer, prepared by them, for the deliberative purposes of the Agency – that of providing care to a patient.

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

15. 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. In doing so, I have given weight to the following relevant factors:³
- (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 documents;
 - (c) the stage of a decision or status of policy development or a process being undertaken at the time the communications were made;
 - (d) whether disclosure of the documents 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 documents would give merely a part explanation, rather than a complete explanation for the taking of a particular decision or the outcome of a process, which the Agency would not otherwise be able to explain upon disclosure of the documents;
 - (f) the impact of disclosing documents in draft form, including disclosure not clearly or accurately representing a final position or decision reached by the Agency at the conclusion of a decision or process; and

² Section 30(3).

³ *Hulls v Victorian Casino and Gambling Authority* (1998) 12 VAR 483.

- (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.
16. Firstly, I acknowledge that Applicant's genuine interest in the documents as it relates to the medical care of their child. However I must consider other relevant factors in determining whether disclosure of another person's personal information would be reasonable in these circumstances.
17. I have decided disclosure of third party personal affairs information would be contrary to the public interest for the following reasons:
- (a) the information is sensitive;
 - (b) the information is the preliminary views of an Agency officer;
 - (c) the information was recorded to assist in communication between officers in the interests of providing medical care to a patient; and
 - (d) I consider disclosure of information provided to the Agency in confidence may inhibit such future communications, which in turn may affect patient care.
18. Therefore, I am satisfied information in the first redaction is exempt from release under section 30(1).

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

19. A document is exempt from release 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 by the Agency?

20. Whether information communicated by an individual to an agency was communicated in confidence is a question of fact.⁴
21. 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.⁵
22. I am satisfied the information provided to the Agency in the first and second redactions contains information provided by a third party in confidence to the Agency. I consider such information is provided to health services with the expectation the information is personal and will be treated in confidence.

⁴ *Ryder v Booth* [1985] VR 869 at [883]; *XYZ v Victoria Police* [2010] VCAT 255 at [264].

⁵ *XYZ v Victoria Police* [2010] VCAT 255 at [265], referring to *Barling v Medical Board of Victoria* (1992) 5 VAR 542, 561-562.

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

23. I consider there is an essential public interest in individuals being able to provide what is often sensitive and confidential information to the Agency. Where this occurs, members of the public need to feel confident the information they provide will be held by the Agency in confidence.
24. Further, I am of the view, if individuals were aware the 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.
25. In the case of an assessment of a child and medical treatment provided, information provided to the Agency is generally sensitive and personal in nature.
26. In its capacity as a healthcare provider, I accept the Agency relies on confidential information being provided by third parties in order for the Agency to conduct a full and informed assessment of a patient with the goal of providing timely and effective health care.
27. I consider disclosure would have a detrimental outcome for patients, and the Agency which relies on the provision of information of this nature to provide timely and effective medical treatment and healthcare services to patients.
28. While I acknowledge the Applicant's personal interest for seeking access to the information and that it relates to their child, I am of the view the public interest in third parties being able to provide confidential information to a healthcare provider, in particular, in the best interests of a child, outweighs the Applicant's personal interest in obtaining the information.
29. For these reasons, I am satisfied the two sentences identified by the Agency in the document are exempt from release under section 35(1)(b).
30. As I have considered both redactions are exempt under sections 30(1) and 35(1)(b) I have not further considered section 33(1) in this matter.

Section 25 – Deletion of exempt or irrelevant information

31. 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.
32. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'⁶ 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 25.⁷

⁶ *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].

⁷ *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].

33. Given my decision is the same as the Agency's decision, and it granted access to the documents in part in accordance with section 25, I consider it remains practicable to provide the Applicant with an edited copy of the document with exempt information deleted.

Conclusion

34. On the information before me, I am satisfied certain information in the documents is exempt from release under sections 30(1) and 35(1)(b).
35. As I am satisfied it is practicable to provide the Applicant with an edited copy of the documents with exempt information deleted in accordance with section 25, access is granted in part.

Timeframe to seek a review of my decision

36. 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.⁸
37. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.⁹
38. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹⁰
39. 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.
40. 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.¹¹

When this decision takes effect

41. My decision does not take effect until the Agency's 14 day review period expires.
42. If a review application is made to VCAT, my decision will be subject to any VCAT determination.

⁸ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

⁹ Section 52(5).

¹⁰ Section 52(9).

¹¹ Sections 50(3F) and 50(3FA).