

## Notice of Decision and Reasons for Decision

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Applicant:	'FM5'
Agency:	Victoria Police
Decision date:	29 December 2023
Section considered:	Section 33(4)
Citation:	'FM5' and Victoria Police (Freedom of Information) [2023] VICmr 117 (29 December 2023)

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FREEDOM OF INFORMATION – employment records – medical examination

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 documents are exempt from release under section 33(4).

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

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

My reasons for decision follow.

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

Joanne Kummrow  
**Acting Information Commissioner**

29 December 2023

## Reasons for Decision

### Background to review

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

...I request all medical notes from each appointment, further referrals to other treating doctors and recommendations made including the diagnoses and reasoning behind the report prepared by [named persons and dates] Notes from telephone calls made with [named person and dates].
2. On [date], the Agency contacted the Applicant advising it had located documents and having consulted with [a medical practitioner] regarding the contents of the documents, the [medical practitioner] considered the documents contain 'sensitive health information of a personal and technical nature that could cause harm to the recipient or others, if to be provided this should only be via their treating medical practitioner (i.e. GP)'.
3. Accordingly, the Agency advised the Applicant that it believes that disclosure of the documents would pose a serious threat to life or health and, in accordance with section 33(4), it would follow the procedure set out in Division 3 of Part 5 of the *Health Records Act 2001 (Vic)* (**Health Records Act**).<sup>1</sup> The Agency invited the Applicant to nominate their own health service provider to give them a copy of the documents within 21 days.
4. On [date], the Applicant responded to the Agency, however, they did not nominate a health service provider as requested.
5. On [date], The Applicant made a complaint regarding the Agency's handling of their request, which was also interpreted by OVIC as a request to review the Agency's refusal to grant access to documents under section 33(4).
6. On [date], the Agency made a decision to refuse access to the Applicant's request under section 33(4) in conjunction with section 26 of the Health Records Act, having located two bundles of documents falling within the terms of the Applicant's request. The Agency's decision letter sets out the reasons for its decision.

### Review application

7. I have examined a copy of the documents subject to review.
8. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
9. I have considered all communications and submissions received from the parties.
10. 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.

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<sup>1</sup> The Agency's letter referred to Division 5 rather than Part 5, which is the relevant provision.

11. 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 exemption

### *Section 33(4) – Request for an applicant's health information where personal safety concerns*

12. Section 33(4) concerns requests for an applicant's own health information, where an agency's principal officer (or a health practitioner appointed by the agency) reasonably believes providing the applicant with the information would pose a serious threat to the life or health of the applicant.
13. If the Agency considers a requested document contains information of this nature:
  - (a) the agency must not give access to the document to the applicant as far as it contains that information;
  - (b) the agency must follow the procedure set out in Division 3 of Part 5 of the Health Records Act; and
  - (c) the document is an 'exempt document' for the purposes of the FOI Act.
14. 'Health information' is defined in section 3 of the Health Records Act and broadly relates to information or opinions about an individual's physical, mental or psychological health, disability and medical services provided to the individual.
15. Section 33(5) provides that a decision made under section 33(4) must be made by an agency's principal officer who is a registered health practitioner under the Health Practitioner Regulation National Law and where the agency's principal officer is not a registered health practitioner, the agency must appoint one to make its decision.
16. The procedure set out in the Health Records Act provides an avenue for access to be provided through an appropriate health service provider nominated by the applicant and approved by the agency, where appropriate.<sup>2</sup>
17. I am satisfied the Agency's decision to refuse access to the request under section 33(4) was made by a registered medical practitioner (the **decision maker**).
18. I also accept the decision maker considered the documents contain the Applicant's health information and they reasonably believe that disclosure of the documents would pose a serious threat to the life or health of the Applicant.
19. I am also satisfied the Agency followed the procedure set out in Division 3 of Part 5 of the Health Records Act, prior to making its decision, by providing the Applicant with an opportunity to nominate a health service provider to discuss the health information with the Applicant.

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<sup>2</sup> Sections 36 to 42 of the *Health Records Act 2001* (Vic).

20. Accordingly, I am satisfied the requested documents are exempt from release under section 33(4).

### **Section 25 – Deletion of exempt or irrelevant information**

21. 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.

22. Determining what is ‘practicable’ requires consideration of the effort and editing involved in making the deletions ‘from a resources point of view’<sup>3</sup> 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.<sup>4</sup>

23. I have considered the effect of deleting exempt information from the documents. In my view, it is not practicable for the Agency to delete the exempt information, because it would render the documents meaningless.

### **Conclusion**

24. On the information before me, I am satisfied the documents are exempt from release under section 33(4).

25. As I am not 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 refused in full.

26. The Schedule of Documents sets out my decision.

### **Timeframe to seek a review of my decision**

27. 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.<sup>5</sup>

28. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.<sup>6</sup>

29. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.<sup>7</sup>

30. Information about how to apply to VCAT is available online 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 by telephone on 1300 018 228.

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<sup>3</sup> *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].

<sup>4</sup> *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].

<sup>5</sup> The Applicant in section 50(1)(b) and the Agency in section 50(3D).

<sup>6</sup> Section 52(5).

<sup>7</sup> Section 52(9).

31. 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.<sup>8</sup>

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<sup>8</sup> Sections 50(3F) and 50(3FA).

## Annexure 1 – Schedule of Documents

Document No.	Date of document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
1.	Various	Medical records	[number of pages]	Refused in full Section 33(4)	Refuse in full Section 33(4)	Section 33(1): I am satisfied it would be unreasonable to disclose the personal affairs information in this document for the reasons outlined in the Notice of Decision, above.  Section 25: I am satisfied it is not practicable to provide the Applicant with an edited copy of this document with exempt information deleted in accordance with section 25.
2.	Various	Medical records	[number of pages]	Refused in full Section 33(4)	Refuse in full Section 33(4)	See comments for Document 1.