

## Notice of Decision and Reasons for Decision

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Applicant:	'FN6'
Agency:	Melbourne Health
Decision date:	17 January 2024
Sections and provisions considered:	Sections 33(1), 35(1)(b), 38
Citation:	'FN6' and Melbourne Health ( <i>Freedom of Information</i> ) [2024] VICmr 10 (17 January 2024)

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FREEDOM OF INFORMATION – medical records – health records – information communicated in confidence – information about third parties – secrecy provision – *Children, Youth and Families Act 2005* (Vic) (**CYF Act**)

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. While I am satisfied that information in the documents is exempt from release under sections 33(1), 35(1)(b) and 38 in conjunction with sections 41 and 191 of the *Children, Youth and Families Act 2005* (Vic) (**CYF Act**), I have decided to release further information to the Applicant.

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 to the documents is granted in part.

The Schedule of Documents in **Annexure 1** sets out my decision in relation to each document. A marked-up copy of certain documents showing exempt information in accordance with my decision has also been provided to the Agency with my decision.

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

This decision will take effect when the Agency's 14 day review period expires.

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When the review period expires, the Agency will provide you with the marked-up documents in accordance with my decision if my decision is not subject to review by VCAT.

My reasons for decision follow.

Shantelle Ryan  
**Acting Public Access Deputy Commissioner**

17 January 2024

## Reasons for Decision

### Background to review

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

...all files, reports and medical records [relating to the Applicant]. The records I'm seeking are from but not limited to The Royal Melbourne Hospital; North Western Mental Health.
2. The Agency identified 269 pages of documents falling within the terms of the Applicant's request and granted access in part under sections 33(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. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
5. I have considered all communications and submissions received from the parties.
6. During the review, the Agency sought to rely on an additional exemption under section 38 in conjunction with the CYF Act.
7. 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.
8. 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.
9. 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'.<sup>1</sup> 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.

### Complaint about the adequacy of document searches

10. During the review, the Applicant raised concerns about the adequacy of the Agency's document searches in relation to their FOI request.

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

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11. In accordance with section 61B(3), the complaint was dismissed for the purpose of it being dealt with by this review.
12. OVIC staff made further enquiries with the Agency to address the Applicant's concerns which resulted in the Agency locating 210 additional pages of documents. The Agency exempted two of the additional pages located in part under section 33(1). All remaining pages were released to the Applicant in full.
13. Following the identification of additional documents, I am satisfied the Agency undertook a thorough and diligent search for the requested documents. Accordingly, I consider the Applicant's complaint has been fully pursued and there is no need to make further enquiries or take further action under the FOI Act in relation to those particular concerns.
14. The two pages of the additional documents that were exempted in part are also subject to this review (Document 2 in the Schedule of Documents in **Annexure 1**).

## Review of exemptions

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

15. 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 other than the Applicant (a **third party**);<sup>2</sup> and
  - (b) such disclosure would be 'unreasonable'.

### *Do the documents contain third party personal affairs information?*

16. 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 such information may be reasonably determined.<sup>3</sup>
17. A document will disclose a third party's personal affairs information if it is capable, either directly or indirectly, of identifying that person.<sup>4</sup>
18. The Agency has released most personal affairs information concerning healthcare staff, except for an email address and telephone numbers.
19. Other personal affairs information that has been exempted relates to third parties who are external to the Agency and includes information that either explicitly identifies them, such as their names, or contains information about them to which their identity could be inferred, such as information they provided to the Agency.

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<sup>2</sup> Sections 33(1) and 33(2).

<sup>3</sup> Section 33(9).

<sup>4</sup> *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].

*Would disclosure of the personal affairs information be unreasonable?*

20. The concept of 'unreasonable disclosure' involves balancing the public interest in the disclosure of official information with the interest in protecting the personal privacy of a third party in the particular circumstances.
21. In *Victoria Police v Marke*,<sup>5</sup> 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'.<sup>6</sup> 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'.<sup>7</sup>
22. 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;
  - (b) the circumstances in which the information was obtained;
  - (c) the Applicant's interest in the information;
  - (d) whether any public interest would be promoted by release of the personal affairs information;
  - (e) the likelihood the information would be disseminated, if released;
  - (f) whether the individuals to whom the information relates object, or would be likely to object, to the release of the information;
  - (g) whether disclosure of the information would or would be reasonably likely to endanger the life or physical safety of any person;<sup>8</sup> and
  - (h) whether disclosure of information would increase the risk to a primary person's safety from family violence.<sup>9</sup>
23. I am satisfied disclosure of the personal affairs information would be unreasonable in the circumstances for the following reasons:
- (a) The Agency obtains sensitive and personal information from patients in its care as well as from third parties in the context of providing medical treatment and healthcare services to patients. Ensuring confidentiality of the information provided as part of a person's medical treatment can be fundamental to providing effective and efficient medical care.

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<sup>5</sup> [2008] VSCA 218 at [76].

<sup>6</sup> *Ibid.*

<sup>7</sup> *Ibid* at [79].

<sup>8</sup> Section 33(2A).

<sup>9</sup> Section 33(2AB).

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- (b) Having considered the nature of the information and the circumstances in which it was communicated to the Agency, I am satisfied it was communicated with an expectation of confidentiality.
  - (c) I accept the Agency relies on information provided by third parties voluntarily. I consider there is a public interest against disclosure of such information in circumstances where maintaining the confidentiality of the information provides for an open and frank exchange of relevant and timely information between Agency officers and third parties.
  - (d) Given the nature and context in which the information was communicated to the Agency by third parties, I consider it is reasonably likely the relevant third parties would object to the release of their personal affairs information under the FOI Act.
24. I am also satisfied that it would be unreasonable to disclose the direct contact details of healthcare providers (their email address and telephone numbers) as their names have already been released to the Applicant and disclosing their contact details will not provide meaningful information to the Applicant in terms of the healthcare services that were provided to them.
25. Accordingly, I am satisfied certain information in the documents is exempt from release under section 33(1).
26. My decision on section 33(1) is set out in the Schedule of Documents in **Annexure 1**.

### *Section 35(1)(b) – Information obtained in confidence by an agency*

27. 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?*

28. Whether information communicated by an individual to an agency was communicated in confidence is a question of fact.<sup>10</sup>
29. 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.<sup>11</sup>
30. I am satisfied certain information in the documents is information that was voluntarily provided to the Agency by a third party concerning the Applicant's health and wellbeing.
31. Having considered the nature of the information and the context in which it was provided, I am satisfied the information was obtained by the Agency in confidence.

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<sup>10</sup> *Ryder v Booth* [1985] VR 869 at [883]; *XYZ v Victoria Police* [2010] VCAT 255 at [264].

<sup>11</sup> *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?*

32. 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 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.
33. 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. 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.<sup>12</sup>
34. In the context of the Agency, being a healthcare provider, the voluntary provision of personal and sensitive information in a healthcare context is necessary for the Agency to be able to effectively discharge its medical and healthcare functions. Importantly, I also consider the withholding of such information from the Agency would have a detrimental impact on the medical outcomes and wellbeing of patients.
35. I am of the view that if individuals were aware information they provide in confidence to the Agency would be disclosed in response to an FOI request, they would be less likely to communicate similar information in the future. I consider this would be a significant and detrimental outcome for the Agency, which relies on receiving such information to provide timely medical treatment and health services to patients.
36. In weighing these competing considerations, I consider the need to protect personal and sensitive information provided in confidence to the Agency for healthcare purposes and in the interests of its patients, outweighs the Applicant's personal interest in obtaining access to the relevant information.
37. My decision on section 35(1)(b) is set out in the Schedule of Documents in **Annexure 1**.

***Section 38 – Documents subject to a secrecy provision***

38. A document will be exempt under section 38 if:
  - (a) there is an enactment in force;
  - (b) that applies specifically to the kind of information in the document; and
  - (c) the enactment must prohibit persons, referred to in the enactment, from disclosing that specific kind of information (either absolutely or subject to exceptions or qualifications).
39. For section 38 to apply, an enactment must be formulated with such precision that it specifies the actual information sought to be withheld.

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

*Child Protection*

40. The documents subject to review include information relating to Child Protection services.
41. The Department of Families, Fairness and Housing (the **Department**) is responsible for enforcing and administering the law relating to Child Protection in Victoria under the CYF Act.
42. Child Protection files come into existence when the Department is notified or becomes aware of a child that is at risk to harm, wellbeing or other safety concerns. The CYF Act provides for voluntary reports from a person and mandatory reporting by persons in certain professions specified under the CYF Act.
43. The main functions of Child Protection are to:
  - (a) investigate matters where it is alleged that a child is at risk of significant harm;
  - (b) refer children and families to services that assist in providing the ongoing safety and wellbeing of children;
  - (c) make applications to the Children's Court if the child's safety cannot be ensured within the family; and
  - (d) administer protection orders granted by the Children's Court.<sup>13</sup>
44. The Department publishes the *Child Protection Manual*, which is used by Child Protection practitioners and contains information for families. The manual is available at [www.cpmanual.vic.gov.au](http://www.cpmanual.vic.gov.au).
45. The role and mandate of Child Protection is obviously an important and significant one. It is also comprehensively regulated under the CYF Act.
46. Parliament has determined strict parameters apply to what information can be released in relation to Child Protection matters, including a prohibition on identifying any person who notified the Department about any child protection concerns (**notifiers**) and any subsequent investigations by the Department into or action taken to address any such concerns.
47. By way of example, sections 41 and 191 of the CYF Act prohibit the disclosure of the name of notifiers, as well as any information likely to lead to the identification of a notifier, except in certain limited circumstances where disclosure is authorised. This reflects the strong need for confidentiality around child protection notifications and any subsequent inquiries or investigations conducted by the Department, in order to assure notifiers of confidentiality when making sensitive notifications to the Department in the interests of protecting a child from harm or possible harm.
48. This means, when a person, who has been involved with Child Protection, or the parent or guardian of such a child, seeks access to information relating to Child Protection, the confidentiality provisions that apply to Child Protection records under the CYF Act are strictly applied.

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<sup>13</sup> See Department of Families, Fairness and Housing, 'Child Protection' at <https://services.dffh.vic.gov.au/child-protection>.



*Application of the confidentiality provisions in the CYF Act*

49. Section 41 of the CYF Act provides:

**41 Identity of reporter or referrer confidential**

- (1) If a report is made to the Secretary under section 28 or 29, a person (other than the person who made it) must not disclose to any person other than the Secretary or a community-based child and family service—
  - (a) the name of the person who made the report; and
  - (b) any information that is likely to lead to the identification of the person who made the report.

Penalty: 60 penalty units.

...

- (2) Subsection (1) and (1A) do not apply if the person who made the report or referral—
  - (a) gives written consent to the Secretary; or
  - (b) gives written or oral consent to the community-based child and family service.

50. Section 191 of the CYF provides:

**191 Confidentiality**

- (1) If a report referred to in section 190(1) is made, a person (other than the person who made it or a person acting with the written consent of the person who made it) must not disclose to any person other than a protective intervener or a community-based child and family service in accordance with subsection (4)—
  - (a) the name of the person who made the report; or
  - (b) any information that is likely to lead to the identification of the person who made the report.

Penalty: 10 penalty units.

- (2) Subsection (1) does not apply to a disclosure made to a court or tribunal in accordance with section 190.
- (3) Subsection (1) does not apply to a disclosure to the Therapeutic Treatment Board of the name or information leading to the identification of a police officer who made a report under section 185.

...

51. In summary, sections 41(1) and 191(1) of the CYF Act prohibit disclosure of the names of persons as well as any information likely to lead to the identification of any person who:

- (a) provided confidential Child Protection information to the Department of Families, Fairness and Housing in the course of a protective intervention investigation; or
- (b) notified the Department of their concerns for the wellbeing of a child.

52. Unauthorised disclosure of such information is an offence and carries penalties under the CYF Act, which demonstrates Parliament's intention that such information should remain protected.

53. I am satisfied the relevant sections of the CYF Act, as described above, prohibit the disclosure of the identity, or any information likely to lead to the identification of a notifier/reporter, or person who provides information in confidence to the Agency regarding the welfare or well-being of a child. This includes not only a report or record of confidential information, but the date on which the Agency received a Child Protection notification and any subsequent documents created containing details of the report or confidential information provided to the Agency.
54. There is no information before me to suggest any of the exceptions under the CYF Act authorise disclosure of the documents to the Applicant in this instance.
55. Having reviewed information in the documents and the information before me, I am satisfied:
- (a) the CYF Act is an enactment in force for the purposes of section 38;
  - (b) the documents contain specific information prohibited from disclosure under sections 41(1) and 191(1) of the CYF Act;
  - (c) these provisions prohibit persons, including the Agency, from disclosing the specific information in the documents that reveal the identity of a referrer as well as details of the report or confidential information provided to Child Protection; and
  - (d) the prohibition under sections 41(1) and 191(1) of the CYF Act is absolute, in that there are no exceptions or qualifications to the prohibition on disclosure.
56. Accordingly, I am satisfied certain information in the documents is exempt from release under section 38 of the FOI Act in conjunction with sections 41(1) and 191(1) of the CYF Act.
57. The Schedule of Documents in **Annexure 1** outlines my decision in relation to section 38.

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

58. 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.
59. Determining what is ‘practicable’ requires consideration of the effort and editing involved in making the deletions ‘from a resources point of view’<sup>14</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>15</sup>
60. The Agency provided the Applicant with edited copies of the documents with exempt information deleted and I consider it remains practicable to provide the Applicant with an edited copy of the documents with exempt information deleted.

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<sup>14</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>15</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], [155].

### Conclusion

61. On the information before me, I am satisfied that information in the documents is exempt from release under sections 33(1), 35(1)(b) and 38 in conjunction with sections 41(1) and 191(1) of the CYF Act.
62. The Schedule of Documents in **Annexure 1** sets out my decision in relation to each document.
63. A marked-up copy of the documents indicating exempt or irrelevant information in accordance with my decision has been provided to the Agency.

### Timeframe to seek a review of my decision

64. If either party to this review is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.<sup>16</sup>
65. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.<sup>17</sup>
66. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.<sup>18</sup>
67. 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.
68. 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>19</sup>

### Third party review rights

69. As I have determined to release documents that contain information that the Agency 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.<sup>20</sup>
70. I have determined that it would not be practicable to do so, as the communicator of the relevant information is not identifiable from the information that I have determined to release.

### *When this decision takes effect*

71. 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.

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

<sup>17</sup> Section 52(5).

<sup>18</sup> Section 52(9).

<sup>19</sup> Sections 50(3F) and 50(3FA).

<sup>20</sup> Sections 49P(5), 50(3AB) and 52(3).

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## Annexure 1 – Schedule of Documents

Document No.	Date of document	Document Description	No. of pages	Agency Decision	OVIC Decision
1.	Various	Medical records	269	<b>Released in part</b> Sections 33(1), 35(1)(b), 38	<b>Release in part</b> Sections 33(1), 35(1)(b), 38 The document is to be released in accordance with the marked-up version of the document provided to the Agency with my decision.
2.	Various	Medical records	210	<b>Released in part</b> Section 33(1)	<b>Release in part</b> Sections 33(1) No further information is to be released.