

Notice of Decision and Reasons for Decision

Applicant:	'DK5'
Agency:	Mercy Hospitals Victoria Ltd
Decision date:	28 July 2021
Exemptions considered:	Sections 33(1), 35(1)(b)
Citation:	'DK5' and Mercy Hospitals Victoria Ltd (Freedom of Information) [2021] VICmr 222 (28 July 2021)

FREEDOM OF INFORMATION – medical records – information provided by third parties – names of agency officers

All reference to legislation in this document is 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.

During the review, the Agency agreed to the disclosure of certain personal affairs information in the documents. Except for the disclosure of this information, my decision is the same as the Agency's decision.

I am satisfied certain information in the documents is exempt under section 33(1) and 35(1)(b).

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, I have granted access to the documents in part.

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner

28 July 2021

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency seeking access to their complete medical record.
2. The Agency identified certain documents falling within the terms of the Applicant's request. It granted access to certain documents in full and refused access to certain information under sections 33(1) and 35(1)(b). The Agency's decision letter sets out the reasons for its decision.

Review

3. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
4. I have examined copies of the documents subject to review.
5. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
6. I have considered all communications and submissions received from the parties.
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.

Complaint regarding adequacy of document searches

9. As well as requesting a review of the Agency's decision, the Applicant made a complaint to OVIC that certain documents should have been located in response to their request. The Applicant's complaint has been dealt with as part of this review.
10. OVIC made enquiries with the Agency regarding documents identified by the Applicant. I am satisfied the Agency has undertaken appropriate document searches and has agreed to provide additional records to the Applicant under a separate FOI request.
11. Therefore, I am satisfied the Applicant's complaint has been resolved and no further action is required to be taken.

Review of exemptions

Section 33(1) – Personal affairs information

12. 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**);¹ and

¹ Sections 33(1) and (2).

- (b) such disclosure would be 'unreasonable'.
13. 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.²
 14. 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.
 15. In determining whether the disclosure of a document would involve the unreasonable disclosure of information relating to the personal affairs of a third party, I must take into account whether the disclosure of the information would, or would be reasonably likely to, endanger the life or physical safety of any person.³ However, I do not consider this to be a relevant factor in the circumstances.
 16. When determining whether disclosure of a document would involve the unreasonable disclosure of a third party's personal affairs information, an agency must notify a third party person (or their next of kin, if deceased) that an FOI request has been received for documents containing their personal information and seek their view as to whether disclosure of the document should occur.⁴ However, this obligation does not arise in special circumstances, including where it is not practicable to do so.⁵
 17. The Agency advised it did not consult with Agency officers as it considered it likely they would object to disclosure of their personal affairs information in the documents.

Do the documents contain personal affairs information?

18. The documents contain the names of third parties, including Agency officers and I am satisfied this information constitutes and relates to the personal affairs of third parties.

Would disclosure be unreasonable?

19. In determining whether disclosure of the personal affairs information of third parties would be unreasonable in the circumstances of this case, I have given consideration to the following factors:
 - (a) the nature of the personal affairs information (for example, whether it is sensitive or its current relevance);
 - (b) the extent to which the information is available to the public;
 - (c) the circumstances in which the information was obtained (for example, whether it was obtained involuntarily or in confidence);
 - (d) the Applicant's interest in the information (including their purpose for seeking access to the documents);
 - (e) whether any public interest would be promoted by release of the information;
 - (f) whether the individuals to whom the information relates object, or would be likely to object to the release of the information;
 - (g) the likelihood of further disclosure of the information, if released; and

² Section 33(9).

³ Section 33(2A).

⁴ Section 33(2B).

⁵ Section 33(2C).

- (h) whether disclosure of the information would, or would be reasonably likely to, endanger the life or physical safety of any person.
20. I have also considered the Agency's submission in relation to enquiries made by OVIC staff regarding whether disclosure of the personal affairs information would be unreasonable:
- (a) In the decision of *Pezzimenti v Victorian WorkCover Authority*,⁶ in which the Victorian Civil and Administrative Tribunal (VCAT) determined release of an individual's name would be unreasonable as its release would not 'throw any light' on the issues raised by the applicant in that case. Similarly, the Agency submits revealing the names of additional individuals in these documents would not provide any more information to the Applicant regarding clinical decisions in relation to his medical care and treatment. Should the Applicant have any concerns with his medical care, they do not require the names of additional Agency officers that appear in the documents.
- (b) The Agency also referenced the VCAT decision of *Coulson v Department of Premier and Cabinet*⁷ noting the names of senior Agency officers had been released in accordance with the names of executive officers in that decision.
- (c) The Agency also advised it no longer seeks to refuse access to the following information in the documents:
- i. the name of Dr [name] where it appears six times on page 170; and
 - ii. the name '[name]' where it appears twice on page 171.
21. I accept the above information constitutes personal affairs information of third parties.
22. Having reviewed the documents and information before me, I have determined the disclosure of certain information in the document would be unreasonable for the following reasons:
- (a) I consider the relevant personal affairs information, given the context in which it appears in the documents and the circumstances in which it was provided to the Agency, was done so with an expectation of privacy and confidentiality.
- (b) I acknowledge the Applicant's interest in seeking access to this information. However, I note the names of Agency officers and other third parties has been carefully assessed by the Agency and released wherever possible. I also note the Agency's view that, for accountability purposes, the Applicant does not need the names of additional Agency officers to make a complaint regarding their medical care and treatment, should they wish to do so.
- (c) I am not satisfied there is an overriding public interest in the disclosure of the personal affairs information of the relevant third parties that outweighs the interest in protecting their personal privacy in the circumstances.
23. Accordingly, with the exception of the information set out in paragraph 20(c) above, I am satisfied the information exempted by the Agency under section 33(1) is exempt.

⁶ (General) [2008] VCAT 449.

⁷ (Review and Regulation) [2018] VCAT 229.

Section 35(1)(b) – Information provided to an agency 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 or matter communicated in confidence?

25. When determining whether information was communicated in confidence, it is necessary to consider the position from the perspective of the communicator.⁸ Further, confidentiality can be expressed or implied from the circumstances of the matter.⁹
26. The information exempted by the Agency under section 35(1)(b) includes information voluntarily provided to the Agency by a person or persons in the course of the Agency providing medical care and treatment to the Applicant.

Taking into account the sensitive nature of the information and the circumstances in which and the purpose for which it was provided to the Agency, I am satisfied the information was communicated to the Agency in confidence.

Would disclosure of the information be contrary to the public interest as it would be reasonably likely to impair the ability of the Agency to obtain similar information in the future?

27. The second condition to be met before section 35(1)(b) will apply to information communicated in confidence is that disclosure would be contrary to the public interest as it would be reasonably likely to impair the ability of an agency from obtaining similar information in the future.
28. This means I must be satisfied, if the information were to be disclosed, it would impair the ability of the Agency to obtain similar information in the future. For example, others in the position of the communicator or communicators would be reasonably likely to not provide similar information to the Agency in the future.
29. I accept such information where it relates to a patient receiving medical care and treatment by the Agency, by its very nature, will generally be personal and sensitive.
30. I am satisfied there is an essential public interest in third parties being able to provide information of this nature to the Agency.
31. Where it is beneficial or necessary for information of this nature to be disclosed to the Agency, I am of the view third parties need to feel confident the information they provide, including their identity and any identifying information, will be held in confidence by the Agency.¹⁰
32. I am of the view, if such individuals were aware their identity and the information they provided to the Agency in confidence would be disclosed in response to an FOI request, they would be less likely to communicate similar information to the Agency in the future. I consider this would be a significant

⁸ *XYZ v Victoria Police (General)* [2010] VCAT 255 at [265].

⁹ *Ibid.*

¹⁰ See *Maki v Alfred Hospital*, unreported, VCAT, Davis M, 19 April 2002.

and detrimental outcome for the Agency, which relies on receiving such information to provide timely and necessary medical care and treatment to patients.

33. In the context of the Agency, being a health services provider, I accept the voluntary provision of personal and sensitive information in a clinical context is necessary for the Agency to be able to effectively discharge its health services 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.
34. While I acknowledge the Applicant has a genuine interest in obtaining full access to their medical records, in weighing these competing considerations, I consider the need to protect personal and sensitive information provided by a third party to the Agency in confidence for a clinical purpose, and in the interests of its patients, outweighs the Applicant's personal interest in obtaining access to this information.
35. Accordingly, I am satisfied the information exempted by the Agency under section 35(1)(b) is exempt.

Section 25 – Deletion of exempt or irrelevant information

36. 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.
37. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'¹¹ 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 25.¹²
38. I have considered the effect of deleting exempt information from the documents. In my view, it is practicable for the Agency to delete the exempt information, because it would not require substantial time and effort, and the edited documents would retain meaning.

Conclusion

39. On the information before me, I am satisfied certain information in the documents is exempt under section 33(1) and 35(1)(b).
40. Except for the disclosure of the additional personal affairs information, which the Agency agreed to disclose in the documents during the review, my decision is the same as the Agency's decision.
41. 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, I have granted access to the documents in part.
42. Therefore, the documents are to be released to the Applicant:
 - (a) with information the Agency exempted from release under sections 33(1) and 35(1)(b) deleted in accordance with section 25; and
 - (b) with the following information released:

¹¹ *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].

¹² *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].

- (i) the name of Dr [name] where it appears six times on page 170 ; and
- (ii) the name '[name]' where it appears twice on page 171 which is not exempt under section 33(1).

Review rights

- 43. If either party to this review is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.¹³
- 44. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹⁴
- 45. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹⁵
- 46. 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.
- 47. 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.¹⁶
- 48. In this matter, I have determined it is not practicable to contact the persons whose personal affairs information the Agency has agreed to release to the Applicant.¹⁷

When this decision takes effect

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

¹³ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

¹⁴ Section 52(5).

¹⁵ Section 52(9).

¹⁶ Sections 50(3F) and (3FA).

¹⁷ Section 49P(5).