

## Notice of Decision and Reasons for Decision

---

Applicant:	'FP8'
Agency:	Mercy Hospitals Victoria Ltd
Decision date:	4/3/2024
Exemptions and provisions considered:	Sections 33(1), 35(1)(b), 25
Citation:	'FP8' and <i>Mercy Hospitals Victoria Ltd</i> (Freedom of Information) [2024] VICmr 30 (4 March 2024)

---

FREEDOM OF INFORMATION – Applicant's own records – mental health records – aged records – phone numbers of known individuals – records of discussions with Agency officers

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 in terms of exemptions applied, however I have not determined any additional information can be released.

I am satisfied the information is exempt from release under section 33(1).

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

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

My reasons for decision follow.

Sean Morrison  
**Information Commissioner**

4/3/2024

## Reasons for Decision

### Background to review

1. The Applicant made a request to the Agency using their FOI request seeking access to discharge summaries and clinical notes relating to their admission during a specified period.
2. The Agency identified four documents falling within the terms of the Applicant's request and granted access to two documents in full, exempting two documents in part, refusing access to certain information under section 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 documents 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.

### Review of exemptions

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

10. 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>1</sup> and
  - (b) such disclosure would be 'unreasonable'.

---

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

*Do the documents contain personal affairs information of individuals other than the Applicant?*

11. 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.<sup>2</sup>
12. 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.<sup>3</sup>
13. The documents contain names, mobile numbers and records of three phone conversations between an Agency officer and a third party.

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

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 of a matter.
15. In *Victoria Police v Marke*,<sup>4</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>5</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>6</sup>
16. 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 of disclosure of information, if released;
  - (f) whether the individuals to whom the information relates object, or would be likely to object, to the release of the information;

---

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

<sup>3</sup> *AB v Department of Education and Early Childhood Development [2011] VCAT 1263* at [58]; *Akers v Victoria Police [2003] VCAT 397* at [41].

<sup>4</sup> [2008] VSCA 218 at [76].

<sup>5</sup> *Ibid.*

<sup>6</sup> *Ibid* at [79].

- (g) whether disclosure of the information would or would be reasonably likely to endanger the life or physical safety of any person;<sup>7</sup>
- (h) whether the disclosure would increase the risk to a primary person's safety from family violence.<sup>8</sup>

*Consultation*

- 17. There is no information before me indicating the Agency undertook consultation in relation to this matter. However, I accept the third parties whose personal affairs information is contained in the documents would object to the release of their information to the Applicant in the circumstances of this matter.

*Mandatory consideration*

- 18. As stated above, 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,<sup>9</sup> and whether disclosure would increase the risk to a primary person's safety from family violence.<sup>10</sup>
- 19. As required, I have considered the application of these factors in the circumstances.

*Names*

- 20. The document contains the name of a third party who contacted the Agency while the Applicant was in their care. I will discuss this information below in relation to section 35(1)(b).
- 21. The document also contains two names provided by the Applicant to the Agency as part of recording relevant personal history in relation to their health.
- 22. I have considered the fact the Applicant is aware of the names in the document. In one sense, this reduces the sensitivity of the information.
- 23. However, as set out above, I accept that the third parties would likely object to release of the information in the circumstances of this matter and also consider the utility in disclosing the information through FOI is limited in these circumstances.
- 24. Further, I note the unrestricted and unconditional nature of release under the FOI Act.
- 25. On balance, I consider the release of the names in the document would be unreasonable.

*Mobile numbers*

- 26. In relation to direct phone numbers, I have determined their release would be unreasonable as:

---

<sup>7</sup> Section 33(2A).

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

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

<sup>10</sup> Section 33(2AB).

- (a) the age of the documents mean the exempted telephone numbers are now approximately 15 years old, and may no longer belong to the persons named in the documents; and
- (b) release of direct contact information may interfere with the personal privacy of third parties.

*Records of phone conversations*

- 27. The remaining information is records of phone conversations between the Agency and a third party.
- 28. During the review, the Applicant was informed that the individual was not a member of the authorities/police.
- 29. I acknowledge the Applicant's interest in obtaining access to their medical record in full. I also appreciate redactions made to documents can create a sense of disappointment and frustration to an applicant, regardless of whether only a small amount of material is withheld, and an applicant may simply wish for a complete copy of a document without any redactions to any pages. To the extent the Applicant's motivations for seeking access to the information is to obtain a copy of the documents with no redactions, it would be met by release of the information.<sup>11</sup>
- 30. It is evident from the face of the documents that the Applicant is aware of the fact this person contacted the Agency, with the records confirming the Applicant was informed on each of the three occasions this individual contacted the Agency.
- 31. However, I have considered the impacts of release of the information through FOI on the personal privacy of the third party.
- 32. In the circumstances of the matter and acknowledging the sensitivity of certain content in the document, I have determined release of this information would be unreasonable.

*Conclusion*

- 33. I am satisfied the names, phone numbers and records of phone calls are exempt under section 33(1).
- 34. The Schedule of Documents in **Annexure 1** outlines my decision in relation to section 33(1).

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

- 35. 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

---

<sup>11</sup> *Hanson v Department of Education and Training* [2007] VCAT 123.

- (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.
36. 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>
37. Though I have concluded all information subject to review is exempt under section 33(1), for completeness, I will also briefly address whether section 35(1)(b) would apply to the records of the phone calls.
38. I accept the phone calls were made in confidence to the Agency. However, I have also considered the context and content of the entries.
39. As discussed above, it is evident the third party intended for the information to be shared with the Applicant at the time it was conveyed.
40. I consider these circumstances are distinguishable from other circumstances where an Agency may obtain information from a third party, and the person conveying the information makes it clear they do not want the information shared with anyone, including the Applicant.
41. In these circumstances, I am not satisfied the Agency's ability to obtain similar information in future would be impacted by release of this information.
42. Accordingly, I am not satisfied the information is exempt under section 35(1)(b).
43. The Schedule of Documents in **Annexure 1** outlines my decision in relation to section 35(1)(b).

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

44. 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.
45. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'<sup>13</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>14</sup>

---

<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.

<sup>13</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>14</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].

46. 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

47. On the information before me, I am not satisfied the information redacted by the Agency is exempt under 35(1)(b). I am satisfied the information redacted by the Agency is exempt under section 33(1).
48. As 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

49. 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>15</sup>
50. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.<sup>16</sup>
51. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.<sup>17</sup>
52. 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.
53. 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>18</sup>

---

<sup>15</sup> The Applicant in section 50(1)(b) and the Agency in section 50(3D).

<sup>16</sup> Section 52(5).

<sup>17</sup> Section 52(9).

<sup>18</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.	[date]	Hardcopy notes from Vol 1 of 4	14	Released in part Section 33(1)	Release in part Sections 33(1), 25  The document is to be released except for the following information which is exempt under section 33(1) and is to be deleted in accordance with section 25: <ul style="list-style-type: none"> <li>the information redacted by the agency.</li> </ul>	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 practicable to provide the Applicant with an edited copy of this document with exempt information deleted in accordance with section 25.
2.	[date]	Hardcopy notes from Vol 1 of 4	6	Released in full	Not subject to review	
3.	[date]	Hardcopy notes from Vol 1 of 4	25	Released in full	Not subject to review	
4.	[date]	Hardcopy notes from Vol 1 of 4	111	Released in part Sections 33(1), 35(1)(b), 25	Release in part Sections 33(1), 25  The document is to be released except for the	Sections 33(1) and 25: see comments for Document 1.  Section 35(1)(b): I am satisfied the information in the document was provided to the Agency in confidence.



OFFICIAL

Document No.	Date of document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
					following information which is exempt under section 33(1) and is to be deleted in accordance with section 25: <ul style="list-style-type: none"><li>the information redacted by the agency.</li></ul>	However, I am not satisfied disclosure of the information in these circumstances would be contrary to the public interest within the meaning of section 35(1)(b) for the reasons outlined in my Notice of Decision above.