

Notice of Decision and Reasons for Decision

Applicant:	'FW7'
Agency:	South West Healthcare
Decision date:	18 June 2025
Exemptions provision considered:	Sections 30(1), 33(1), 35(1)b), 25
Citation:	'FW7' and South West Healthcare (Freedom of Information) [2025] VICmr 34 (18 June 2025)

FREEDOM OF INFORMATION – medical records – Riskman – In Depth Case Review (IDCR) – emergency response record – factual information – information provided in confidence – service review – post event analysis

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 and more information is to be released.

The Schedule of Documents in **Annexure 1** sets out my decision in relation to each document. A marked-up copy of Documents 1 and 2 showing exempt information in accordance with my decision has been provided to the Agency.

Please refer to pages 10-11 for information about review rights through the Victorian Civil and Administrative Tribunal (**VCAT**).

My reasons for decision follow.

Penny Eastman
Public Access Deputy Commissioner

18 June 2025

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency seeking access to 'additional clinical notes and incident reports/investigations' relating to events the Applicant experienced at the Agency on [date].
2. The Agency identified 4 documents falling within the terms of the Applicant's request. The Agency:
 - (a) released 2 documents in full (Documents 3 and 4)
 - (b) refused access to the remaining 2 documents under sections 30(1) and 35(1)(b) (Documents 1 and 2).
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. I note that Document 1 has two attachments, being Documents 2 and an additional document that was not included in the Agency's decision (Document 5). Therefore, my review covers Documents 1, 2 and 5.
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 relevant 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.

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

Review of exemptions

Section 30(1) – Internal working documents

11. For more information about section 30 see the FOI Guidelines.²
12. Section 30(1) exempts documents that contain opinion, advice or recommendation, or consultation or deliberation, where disclosure would be contrary to the public interest. A document is not exempt simply because it is an internal working document.³
13. To be exempt under section 30(1), three conditions must be satisfied:
 - (a) the document or information is matter in the nature of
 - (i) opinion, advice or recommendation prepared by an agency officer or a Minister or
 - (ii) consultation or deliberation that has taken place between agency officers or Ministers
 - (b) the matter was created during the deliberative process of an agency, Minister, or the government's functions
 - (c) disclosure of the matter would be contrary to the public interest.
14. There are four circumstances where section 30(1) does not apply:
 - (a) documents required to be made available for inspection and purchase under section 8
 - (b) purely factual information
 - (c) certain documents relating to adjudicative functions
 - (d) documents more than 10 years old.

Do the documents contain opinion, advice or recommendation, or consultation or deliberation?

15. I consider significant parts of Documents 1 and 2 contain factual information to which section 30(1) does not apply. I also note that much of this information would be known by the Applicant. However, I consider that both documents also include the opinion, advice or recommendation of Agency officers.
16. I consider Document 5, which is an attachment to Document 1, contains only factual information and it is therefore not exempt under section 30(1).

Was the matter was created during the deliberative process of an agency, Minister, or the government's functions?

² <https://ovic.vic.gov.au/freedom-of-information/foi-guidelines/section-30/>.

³ *Graze v Commissioner of State Revenue* [2013] VCAT 869, 25.

17. I am satisfied the information in Documents 1 and 2 was created during the deliberative processes of the Agency, being its internal quality review and service improvements purposes.

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

18. In deciding whether disclosure of the information would be contrary to the public interest, I have given weight to the following relevant factors:⁴
- (a) the right of every person to gain access to documents under the FOI Act
 - (b) the sensitivity of the issues involved and the broader context of how the document was created
 - (c) the stage of a decision or policy development at the time the communications were made
 - (d) whether disclosure of the document would be likely to inhibit communications between agency officers that are essential for the agency to make an informed and well-considered decision or for those officers to properly participate in a process of the agency's functions (such as an audit or investigation, regulatory or law enforcement function)
 - (e) whether disclosure of the document would give merely a part explanation, rather than a complete explanation, for the taking of a particular decision or the outcome of a process, but only where the agency would not otherwise be able to explain upon disclosure of the document
 - (f) the impact of disclosing documents in draft form, including disclosure not clearly or accurately representing a final decision by an agency or Minister
 - (g) the likelihood that disclosure would inhibit the independence of officers, including their ability to conduct proper research and make detailed submissions
 - (h) the public interest in the community being better informed about an agency's deliberative, consultative and decision-making processes
 - (i) the public interest in government transparency and accountability by enabling scrutiny or criticism of decisions and the decision-making process and building the community's trust in government and its decision-making processes
 - (j) whether there is controversy or impropriety around the decision or the decision-making process.
19. I have decided it would be contrary to the public interest to disclose certain information in Document 2 for the following reasons:

⁴ See <https://ovic.vic.gov.au/freedom-of-information/foi-guidelines/section-30/#disclosure-would-be-contrary-to-the-public-interest>.

- (a) In my view, the preparation of Document 2 requires agency officers to provide their unvarnished view to the reviewer, and the reviewer to have no qualms about providing their full critique of agency processes and the actions of agency officers.
 - (b) I acknowledge the strong personal interest of the Applicant in receiving their entire medical record; however, I must also consider how important such review documents are to the avoidance of similar incidents in the future and improvements to health services.
 - (c) While agency officers have a duty to provide their professional views, the provision and recording of views that may be critical of colleagues can be difficult. As such, it is often done with an expectation of certain levels of confidentiality or restriction on who can access the content. I consider if agency officers expected such information would be then released under FOI with no restriction on further dissemination and the potential for broader circulation and scrutiny, they may be less willing to record their fulsome views or critique.
 - (d) In this case, I therefore consider that the disclosure of certain information in the document would be contrary to the public interest as it will affect the quality of information provided to reviewers, and the recording of substantive analyses of events at the Agency in the future. I see this in turn would have a detrimental impact on the health services provided by the Agency.
20. I am therefore satisfied certain information in Document 2 is exempt under section 30(1).
21. However, I am not satisfied other information in the nature of opinion, advice or recommendation would be contrary to the public interest to disclose. This includes:
- (a) less sensitive and generic information in Documents 1 and 2
 - (b) in Document 2, the recommendations table where the information is general in nature
 - (c) in Document 2, internal processes following the In Depth Case Review.
22. This information is therefore not exempt under section 30(1).
23. My decision in relation to section 30(1) is in accordance with the marked-up document provided to the Agency with this decision.

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

24. For more information about section 33 see the FOI Guidelines.⁵

⁵ <https://ovic.vic.gov.au/freedom-of-information/foi-guidelines/section-33/>.

25. Section 33(1) protects an individual's privacy where their right to privacy outweighs the public interest in disclosing their information.⁶ This will only occur when disclosing the individual's personal affairs information is unreasonable.
26. A document or information is exempt under section 33(1) if two conditions are satisfied:
 - (a) the document or information relates to the 'personal affairs' of a natural person (living or deceased)
 - (b) disclosure of that personal affairs information is unreasonable in all the circumstances.
27. For more information about section 33(1) see the FOI Guidelines.⁷

Do the documents contain personal affairs information of other individuals?

28. While not applied by the Agency, as I have decided to release documents exempted by the Agency in full, I have considered whether section 33(1) applies to personal affairs information in the documents.
29. The personal affairs information in the documents are names and position titles.

Consultation

30. The Agency is required to consult with affected third parties, unless it is not reasonably practicable to do so.
31. As the Agency did not apply section 33(1) to the documents, the individuals whose information appears in the documents were not consulted.

Would disclosure of the personal affairs information be unreasonable?

32. In determining whether disclosure of the personal affairs information would be unreasonable in the circumstances, I have considered the following factors:⁸
 - (a) the nature of the personal affairs information
 - (b) the circumstances in which the information was obtained
 - (c) the extent to which the information is available to the public
 - (d) the Applicant's interest in the information
 - (e) whether any public or important 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

⁶ *Victoria Police v Marke* [2008] VSCA 218.

⁷ <https://ovic.vic.gov.au/freedom-of-information/foi-guidelines/section-33/>.

⁸ See <https://ovic.vic.gov.au/freedom-of-information/foi-guidelines/section-33/#would-disclosure-be-unreasonable>.

- (g) whether disclosure of the information would or would be reasonably likely to endanger the life or physical safety of any person.
33. I have decided it would be unreasonable to release certain names in the documents where:
- (a) they do not appear to be senior officers of the Agency or
 - (b) they were not directly involved with the Applicant and
 - (c) were not responsible for clinical decisions or the review of the events related to the Applicant.
34. This information is therefore exempt under section 33(1).
35. I have decided it would not be unreasonable to release certain names and position titles in the documents where:
- (a) they are more senior Agency officers
 - (b) while certain position titles could be used to identify individuals, I consider they are less sensitive and disclosure provides some accountability for the actions taken by the Agency
 - (c) the Agency officers were responsible for the investigation of the incident and the In Depth Case Review.
36. This information is therefore not exempt under section 33(1).
37. My decision in relation to section 33(1) is in accordance with the marked-up document provided to the Agency with this decision.

Section 35 – Documents containing material obtained in confidence

38. Section 35 contains two exemptions that relate to information communicated in confidence by or on behalf of a person or a government to an agency or Minister.
39. In limited circumstances, section 35 may apply to particularly sensitive and confidential information communicated to an agency by its own officers.⁹ For example, in the context of internal complaints and investigations, or where misconduct or corruption is reported. In these situations, the officer's position is similar to that of an outside source.¹⁰
40. For more information about section 35 see the FOI Guidelines.¹¹

⁹ *Sportsbet v Department of Justice* [2010] VCAT 8, [77]-[78], referring to *Birnbaumer v Inner & Eastern Health Care Network* (1999) 16 VAR 9, 17.

¹⁰ *Sportsbet v Department of Justice* [2010] VCAT 8, [77].

¹¹ <https://ovic.vic.gov.au/freedom-of-information/foi-guidelines/section-35/>.

Consultation

41. An agency or Minister must consult with the relevant third party or parties who communicated the information, before making a decision on the request, unless an exception applies, or if consultation is not reasonably practicable.
42. It is not apparent from the Agency's decision that Agency officers were consulted.

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

43. A document may be exempt under section 35(1)(b) if two conditions are satisfied:
 - (a) disclosure would divulge information or matter:
 - (i) communicated in confidence
 - (ii) by or on behalf of a person or a government to an agency or a Minister
 - (b) disclosure would be contrary to the public interest because the disclosure 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?

44. Whether information was communicated in confidence is a question of fact,¹² determined from the perspective of the communicator.¹³
45. I have decided that where information is less sensitive and for the most part factual, it was not provided in confidence.
46. However given the sensitivity of some of the information in the documents, I am satisfied that information was provided to the Agency in confidence.

Would disclosure impair the ability of the Agency to obtain similar information?

47. The term 'impair' is not defined in the FOI Act. However, case law suggests:
 - (a) the degree of impairment must go beyond a trifling or minimal impairment¹⁴
 - (b) there must be an actual impairment to the ability of the agency to obtain similar information in the future¹⁵
 - (c) it is not enough that individuals would be less candid than they otherwise might be¹⁶ or

¹² *Ryder v Booth* [1985] VR 869, 883.

¹³ *XYZ v Victoria Police* [2010] VCAT 255, [265]; *Barling v Medical Board of Victoria* (1992) 5 VAR 542, 561-562.

¹⁴ *Ryder v Booth* [1985] VR 869, 880.

¹⁵ *Birnbauer & Davies v Inner & Eastern Health Care Network* [1999] VCAT 1363, [68] referring to *Ryder v Booth* [1985] VR 869

¹⁶ *Birnbauer & Davies v Inner & Eastern Health Care Network* [1999] VCAT 1363, [68]; approved in *Smeaton v Victorian WorkCover Authority* [2012] VCAT 1549, [69].

would feel resentment at having their confidence betrayed¹⁷

- (d) the necessary level of impairment will be made out if a significant minority of persons in the relevant group would be firmly resistant to providing similar information in the future¹⁸
 - (e) it is the agency that must be impaired from receiving information, not simply a reluctance on the part of a supplier to provide information¹⁹
 - (f) the existence of a statutory duty to provide information does not necessarily exclude the possibility that disclosure would be reasonably likely to impair an agency's ability to obtain similar information in the future, particularly where disclosure might impact the quality and quantity of any future information provided.²⁰ In comparison, an agency will not be impaired from obtaining a specific type of information in future, if there is legislation which compels a person to provide this type of information to the agency.²¹
48. Where I have decided the information was provided in confidence, I have also decided disclosure would impair the ability of the Agency to obtain similar information in the future. This is because:
- (a) while Agency officers must provide their professional advice, where there is greater sensitivity about the conduct of colleagues or the Agency as a whole, the impairment to the provision of such information would not be minimal
 - (b) I consider that the effect of disclosure would be more than that Agency officers would be less candid
 - (c) while this impairment would not apply to all Agency officers, I am satisfied it would apply to a significant minority of persons in that relevant group of people.
49. I am therefore satisfied section 35(1)(b) applies to certain information in the documents.
50. My decision in relation to section 35(1)(b) is in accordance with the marked-up document provided to the Agency with this decision.

Section 25 – Deletion of exempt or irrelevant information

51. 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.
52. Deciding whether it is 'practicable' to delete exempt or irrelevant information requires an agency or Minister to consider:

¹⁷ *Sifredi v Medical Practitioners Board* [1999] VCAT 87 (affirmed on appeal *Medical Practitioners Board of Victoria v Sifredi* [2000] VSC 33).

¹⁸ *Ibid.*

¹⁹ *Kosky v Department of Human Services* [1998] VCAT 290, [22].

²⁰ See *Thwaites v Department of Health and Community Services* (1995) 8 VAR 361, 370; *Woodford v Ombudsman* [2001] VCAT 721, [99]-[101].

²¹ *Barling v Medical Board (Vic)* (1992) 5 VAR 542, 565.

- (a) the effort involved in making the deletions from a resources point of view²² and
- (b) the effectiveness of those deletions – that is, whether the edited document still has meaning.²³

53. 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

54. On the information before me, I am not satisfied the documents exempted by the Agency are exempt in full.
55. However, I am satisfied certain information in Document 1 and 2 is exempt under sections 30(1), 33(1) and/or 35(1)(b).
56. As I am satisfied it is practicable to delete exempt information from Documents 1 and 2, they are to be released to the Applicant in accordance with the marked-up documents provided with this decision.
57. Document 5 is to be released in full.

Timeframe to seek a review of my decision

58. If either party to this review are not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.²⁴
59. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.²⁵
60. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.²⁶
61. 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.
62. 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.²⁷

²² *Mickelborough v Victoria Police* [2009] VCAT 2786, [31]; *The Herald and Weekly Times Pty Limited v The Office of the Premier (General)* [2012] VCAT 967, [82].

²³ *Honeywood v Department of Human Services* [2006] VCAT 2048, [26]; *RFJ v Victoria Police FOI Division (Review and Regulation)* [2013] VCAT 1267, [140], [155]; *Re Hutchinson and Department of Human Services* (1997) 12 VAR 422.

²⁴ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

²⁵ Section 52(5).

²⁶ Section 52(9).

²⁷ Sections 50(3F) and 50(3FA).

Third party review rights

63. As I have determined to release documents that contain the personal affairs information of persons other than the Applicant and documents 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.²⁸
64. In this case, I am satisfied it is practicable to notify the parties of their review rights and confirm they will be notified of my decision on the date of decision or as soon as practical thereafter.

When this decision takes effect

65. My decision does not take effect until the third parties' 60 day review period expires. If a review application is made to VCAT, my decision will be subject to any VCAT determination.

²⁸ Sections 49P(5), 50(3), 50(3AB) and 52(3).

Annexure 1 – Schedule of Documents

Document No.	Date of document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
1.	[Date]	Riskman incident report	7	Refused in full Sections 30(1) and 35(1)(b)	Release in part Sections 33(1), 35(1)(b) The document is to be released in accordance with the marked-up document provided with this decision.	The reasons for my decision are described above.
2.	[Date]	In Depth Case Review (IDCR) (This is the first attachment to Document 1)	13	Refused in full Sections 30(1) and 35(1)(b)	Release in part Sections 30(1), 33(1), 35(1)(b) The document is to be released in accordance with the marked-up document provided with this decision.	The reasons for my decision are described above.
3.	[Date]	Night progress report	2	Released in full	Not subject to review	
4.	[Date]	Clinical notes	19	Released in full	Not subject to review	
5.	Undated	Emergency response record (ERR) (This is the second attachment to Document 1)	2	Not assessed	Release in full	While not assessed by the Agency, I have considered whether exemptions apply. In my view the document

Document No.	Date of document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
						contains factual information, and information (patient observations) that would ordinarily be provided to patients. It is therefore not exempt under sections 30(1), 33(1) or 35(1)(b) or any other exemption.