

Notice of Decision and Reasons for Decision

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| Applicant: | 'FX8' |
| Agency: | Eastern Health |
| Decision date: | 11 June 2025 |
| Exemption and provision considered: | Sections 30(1), 25 |
| Citation: | 'FX8' and Eastern Health (Freedom of Information) [2025] VICmr 44 (11 June 2025) |

FREEDOM OF INFORMATION – Comprehensive Report – incident reports – incident review – incident investigation – medical documents

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 certain information in 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.

I am satisfied information in the documents is not exempt from release under section 30(1). I have decided to release additional information in the documents to the Applicant where it is not irrelevant personal affairs information.

A marked-up copy of the documents showing irrelevant information in accordance with my decision has been provided to the Agency.

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

My reasons for decision follow.

Penny Eastman
Public Access Deputy Commissioner

11 June 2025

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency seeking access to 'all incident reports in unredacted form' relating to the Applicant. While the request asked for unredacted documents, the Applicant nevertheless specified that they agreed to the redaction of identifying information of Agency officers and another patient.
2. The Agency located 4 incident reports falling within the terms of the Applicant's request and decided to release them to the Applicant in part, exempting certain information under sections 33(1), 30(1) and 25.
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 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.

Attempted informal resolution

11. During the review, OVIC staff provided the Agency with their initial view that further information would likely be released in the documents because:

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

- (a) certain information is factual in nature
 - (b) certain information of this nature would already be known to the Applicant or can be inferred from information already released and
 - (c) such information will continue to be recorded by healthcare professionals as part of their professional responsibilities and obligations irrespective of disclosure under the FOI Act in the circumstances of this case.
12. In response, the Agency agreed with OVIC staff's view relating to the release of certain additional information in the documents. I appreciate the Agency's engagement in this process.
13. The Agency also submitted that it considered certain information in the documents would be exempt from release under section 30(1) if I did not accept its view that the information was otherwise irrelevant under section 25.
14. I have considered whether section 30(1) applies to the information that the Agency considered is irrelevant to the Applicant's request as I am not satisfied it is irrelevant under section 25. My decision on these points is set out further, below.

Review of exemptions

15. As the Applicant specified in their request that they do not seek personal affairs information of third parties, and confirmed this in their review application to OVIC, it is unnecessary to consider the application of section 33(1) to information in the documents. Accordingly, the only exemption to consider in this matter is section 30(1).

Section 30(1) – Internal working documents

16. 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.²
17. 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.
18. There are four circumstances where section 30(1) does not apply:

² *Graze v Commissioner of State Revenue* [2013] VCAT 869, 25.

- (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.

19. For more information about section 30 see the FOI Guidelines.³

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

20. I consider a substantial amount of the information that the Agency exempted under section 30(1) contains factual information to which section 30(1) does not apply, due to section 30(3). I am satisfied this information is not intertwined with deliberative information.

21. I accept certain information exempted by the Agency contains opinion and recommendation.

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

22. I am satisfied the information was created during the deliberative processes of the Agency, being its internal quality review and service improvements purposes.

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

23. 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 documents were created
- (c) the stage of a decision or policy development at the time the communications were made
- (d) whether disclosure of the documents 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 documents would give merely a part explanation, rather than a complete explanation, for the taking of a particular decision or the outcome of a process,

³ See <https://ovic.vic.gov.au/freedom-of-information/foi-guidelines/section-30/>.

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

but only where the agency would not otherwise be able to explain upon disclosure of the documents

- (f) the likelihood that disclosure would inhibit the independence of officers, including their ability to conduct proper research and make detailed submissions
- (g) the public interest in the community being better informed about an agency's deliberative, consultative and decision-making processes
- (h) 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
- (i) whether there is controversy or impropriety around the decision or the decision-making process.

24. The Agency decided disclosure of certain information would be contrary to the public interest for the following reasons:

In relation to the incident reports, please note the inherent limitations in using such a document for a legal purpose. Incident reports are created using a state-wide electronic system that was designed for quality review and reporting purposes. The inherent limitations include the following: incident reports contain fields that are completed automatically by the system and cannot be changed by a staff member; incident reports contain fields that require a staff member to select an option from a limited list of options; incident reports are completed at a point in time, before all relevant information may be available; and incident reports are created for quality review purposes, not legal purposes, and are not designed to provide a forensic account of any event. These issues impact on the accuracy, meaningfulness and relevance of incident reports, particularly if they are being used for a purpose other than a quality review purpose.

25. As noted above, only limited information in the documents is matter in the nature of opinion, and most of the exempted information is factual in nature.

26. With respect to the remaining information, I have considered the following factors in making my decision:

- (a) The information is sensitive as it relates to the investigation of clinical incidents which occurred during a patient's medical treatment.
- (b) I accept there is a public interest in those who are directly impacted by clinical incidents being properly informed of those events. Public knowledge of these events allows for informed decision making regarding personal health care and ensures accountability and transparency in the public health care system.
- (c) The public interest must be balanced against the potential for the investigative process into clinical incidents to be undermined by the release of findings through FOI. It is essential for the public to have confidence, that when a serious incident occurs in a public hospital, it will be thoroughly investigated, and appropriate measures identified put in place to mitigate the risk of a similar event occurring. In my view, this is an essential public interest of the kind envisaged by Parliament and enshrined in the object of the FOI

Act when discussing the need for exemptions.⁵ Given that investigations and the findings from them promote continuous improvement in practices, policies and procedures within the public health system, I accept it is essential such processes are as thorough and detailed as possible. However, in this case, I am not satisfied that disclosure of the information will undermine the Agency's future investigations of incidents, or inhibit full and frank reporting, given the nature of the information in these particular documents subject to my review.

27. On careful consideration, I am satisfied that disclosing the deliberative information in the documents will not be contrary to the public interest. Therefore, I am satisfied information in the documents is not exempt under section 30(1).

Section 25 – Deletion of exempt or irrelevant information

28. 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.
29. Deciding whether it is 'practicable' to delete exempt or irrelevant information requires an agency or Minister to consider:
- (a) the effort involved in making the deletions from a resources point of view⁶ and
 - (b) the effectiveness of those deletions – that is, whether the edited document still has meaning.⁷
30. Irrelevant information is information which is clearly outside the scope, or beyond the terms of the applicant's request. In this matter, it is the personal affairs information of other people.
31. The Agency redacted certain information from the documents on the basis that it does not pertain to the incident or audit, and instead concerns subsequent actions. I have considered the Agency's view but in this case I find that all information in the documents concern the incidents and fall within the scope of 'incident reports' which were requested by the Applicant.
32. I have considered the effect of deleting irrelevant information from the documents. In my view, it is practicable for the Agency to delete the irrelevant information, because it would not require substantial time and effort, and the edited documents would retain meaning.

Conclusion

33. On the information before me, I am satisfied information in the documents is not exempt from release under section 30(1). I have decided to release additional information in the documents to the Applicant where it is not irrelevant personal affairs information.

⁵ Section 3.

⁶ *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].

⁷ *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.

34. As I am satisfied it is practicable to provide the Applicant with an edited copy of the documents with irrelevant and exempt information deleted in accordance with section 25, access is granted in part.
35. A marked-up copy of the documents indicating irrelevant information in accordance with my decision has been provided to the Agency.

Timeframe to seek a review of my decision

36. If either party to this review is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.⁸
37. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.⁹
38. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹⁰
39. 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.
40. 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.¹¹

When this decision takes effect

41. 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.

⁸ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

⁹ Section 52(5).

¹⁰ Section 52(9).

¹¹ Sections 50(3F) and 50(3FA).