

Our Ref: F2022/005

1 July 2022

Mr Simon Katterl

By email: simon@simonkatterlconsulting.com

Dear Mr Katterl

Freedom of information request – notice of decision

Thank you for your email to the Mental Health Complaints Commissioner (MHCC) on 8 June 2022 attaching a letter requesting documents under the *Freedom of Information Act 1982* (FOI Act).

I am the officer authorised under s26 of the FOI Act to make decisions in relation to FOI requests made to the MHCC.

My decision and reasons are provided below. A schedule listing the documents and my decision is also enclosed.

In your letter of 8 June 2022 you have stated that the ‘request matches a request made on February 9 because the time has lapsed for a review of the decision by the Office of the Victorian Information Commissioner’ (‘the first request’). You also stated that if the MHCC wishes to notify you of the same decision as provided on 11 April 2022 you ‘understand and expect this’. The decision set out below is the same as the decision notified to you in my letter dated 11 April 2022.

In making my decision I have taken into account all relevant considerations include the following:

- the right to access information in the possession of the MHCC
- the objects of the FOI Act
- the outcome of consultation with third parties as required by the FOI Act (undertaken in response to the first request)
- my knowledge and understanding of how exemptions operate
- internal information in relation to the documents and the application of the exemptions
- your correspondence provided to the MHCC on 1 March 2022 in respect of the first request.

Background

Your letter of 8 June 2022 requested the following:

“Individual service level reports” as indicated in your annual report.

You included a footnote as follows:

Mental Health Complaints Commissioner, Annual Report 2020 (2020) 45
<<https://www.mhcc.vic.gov.au/Api/downloadmedia/%7BFE5EAA05-F24D-4AC1-BDAB-DFFD7583A528%7D>>

We understand that the footnote refers to the text on page 44 of the MHCC's 2020 annual report about the provision of 'individual service provider reports about complaints to designated mental health services'.

The reports include:

- data about the numbers of complaints made to the MHCC for each designated mental health service (service)
- data about complaints made directly to each service – which services are required to report to the MHCC under s267 of the *Mental Health Act 2014* (MH Act)
- classification of the issues raised with various levels of specificity for each service, and a comparison of these to the sector as a whole
- a classification of the outcomes in terms of the 4 A's (action, acknowledgment, answer, apology) and a classification of action outcomes for each service, and a comparison of these to the sector as a whole.

You requested these reports for the periods of 1 July 2014 until 1 January 2022.

You also advised as follows:

I do not wish to have any identifying information regarding a person's individual complaints, and therefore support the redaction of content that identifies a complainant, consumer or carer. I am therefore confident no Division 2 or 3 exemptions apply.

On 10 June 2022 I advised you that the MHCC had waived the requirement for an application fee.

I have interpreted your request as excluding personal affairs information of MHCC staff named in the reports.

Documents relevant to your request

A search of the MHCC electronic case management system identified 96 documents which fall within the scope of your request.

These documents are individual service provider (ISP) reports for the 18 designated mental health services. For each service there are three reports as follows:

- the 2015 report (provided to services in 2017)
- the 2015-2018 report ('the 2018 report' provided to services in late-2019)
- the 2017-2020 report ('the 2020 report' provided to services in mid-2021).

For the following services the MHCC also produced reports relating to specific program areas (for example, relating to different catchment areas or program areas): Eastern Health, Melbourne Health and Monash Health.

The 2020 reports are the last round of reports prepared to the date of your request.

Decision

I assessed the documents in accordance with the FOI Act and decided to:

- grant access to 48 reports in full under the FOI Act
- grant partial access to 48 reports with exempt matter deleted.

Reasons for decision

The information I have assessed as exempt in the reports relates to the sections of the reports titled 'recommendations and service improvements'. The 2018 and 2020 reports (but not the 2015 reports) include a 'recommendations and service improvements' section. Where recommendations were made or service improvements identified these are documented or summarised in the ISP reports.

The exemptions relied upon are as follows: documents to which a secrecy provision applies (s38), documents affecting personal privacy (s33), documents containing material obtained in confidence (s35(1)(b)), law enforcement documents (s31(1)(a)), and internal working documents (s30(1)).

Section 38 Documents to which secrecy provisions of enactments apply

Section 38 of the FOI Act exempts documents where information in those documents is protected by a secrecy provision.

Section 265 of the MH Act is a secrecy provision which falls within the scope of enactments recognised by s38 of the FOI Act. The provision prohibits disclosure by the Commissioner and her staff of any information relating to the affairs of a natural person acquired in the performance of functions or duties or the exercise of powers under the Act unless one of the sub-sections applies (which they do not in the present case). Section 265 specifies the nature and quality of the information which cannot be disclosed. Further, the words 'relating to' indicate a broad ambit so it is sufficient that there is some connection between the information and a natural person and where the information was acquired in the performance of functions or duties or exercise of powers under the MH Act.

The 'recommendations and service improvement' sections of the ISP reports include information relating to the affairs of natural persons, including references to complainants, family members, staff members, and staff holding particular positions. Other indications that the information relates to individuals includes: complaint reference numbers, the year of the complaint or resolution, the circumstances of the complaint or remedial actions which reflect the circumstances of the complaint, responses from individuals, and steps taken by services in response to complaints.

As discussed below, the confidentiality of the process is central to the effectiveness of the MHCC's functions and role, and to maintaining the trust and confidence of the public in the MHCC process.

On this basis my assessment is that the information in the 'recommendations and service improvement' sections of the ISP reports that relate to individual complaints falls within the scope of the exemption in s 38 of the FOI Act.

Section 33 – Documents affecting personal privacy

A document is exempt under section 33 if its release would involve the unreasonable disclosure of information 'relating to the personal affairs of any person'. Personal affairs information includes information that identifies or could identify any person or their address or location or from which those matters could reasonably be determined.

For reasons similar to those outlined above, my view is that the information in the 'recommendations and service improvement' sections of the ISP reports when considered alone, or in light of other information that might be available to others (including the complainant or others), enables the identities of individuals to reasonably be determined. Considering whether or not someone is identifiable is to be considered by reference to the capacity of any member of the public to potentially identify a third party or for someone to identify themselves.

It is not practicable for the MHCC to consult individuals who could be identifiable. My assessment is that disclosure of the information would be unreasonable taking into account:

- the sensitive nature of the information, including where it relates to a person receiving services it is about mental health services which is highly sensitive
- the circumstances in which the information was obtained and held
- the likelihood, given the nature of the information, that individuals would not want information about them disclosed – disclosure could be distressing
- the likelihood that the sensitivity of the information is not diminished by passage of some time
- the likelihood that any public interest in disclosure would be outweighed by the sensitivity and privacy of the individuals who may be identified.
- s 33(2A) which does not apply in the present case.

It is critical to the effective performance of the MHCC that members of the public can be confident that information that may identify them is not disclosed by the MHCC except in the very limited circumstances expressly permitted by the MH Act.

Therefore, my assessment is that the information in the 'recommendations and service improvement' sections of the ISP reports that relate to individual complaints is exempt under s33(1).

Section 35(1)(b) – Documents containing information obtained in confidence

A document is exempt under section 35(1)(b) if its release would disclose information communicated in confidence, and the disclosure would 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.

The reports are headed prominently on the first page, 'Confidential report' and a footer of 'PROTECTED' appears on each page of the 2020 reports. The information is in relation to matters of an inherently sensitive and personal nature.

Further, the complaints function of the MHCC, like that of similar agencies, is premised on a dispute resolution process that is confidential. The primary function is to endeavour to resolve complaints using dispute resolution processes and to identify improvements that can be made. Except where an investigation is undertaken, the recommendations made by the MHCC do not follow a rigorous legal process that requires findings of fact based on evidence and procedural fairness. The recommendations made, and the service improvements identified by services, are part of a confidential process that is in contrast to legal proceedings in an open court.

The confidentiality of the process is supported by the secrecy provision in s 265 of the MH Act. It is also supported by the provision in s 346(2)(l) that expressly permits services to disclose information to the MHCC that would otherwise be prohibited. In addition, services are required to provide the MHCC with 'reasonable assistance' (s 263) and the MHCC has extensive investigatory powers (Part 10, Division 4). All of these provisions support an interpretation of a legislative scheme that is intended to be a confidential process with information disclosed only as expressly permitted by the MH Act.

A number of services consulted about this matter responded that information in the 'recommendations and service improvements' parts of the ISP reports was provided in confidence, and stated that disclosure may impair the ability of the MHCC to obtain similar information in the future and to achieve similar outcomes in the future.

Accordingly, release of this information would disclose matter communicated in confidence by services to the MHCC and by the MHCC to services. Information is shared by services and the MHCC in order to seek to resolve complaints, and to identify and make service improvements, in the expectation that it is only available to the parties to the complaint.

Therefore, my assessment is that the information in the 'recommendations and service improvement' sections of the ISP reports that relates to individual complaints is exempt under section 35(1)(b) as release would disclose information communicated in confidence, and the disclosure would be contrary to the public interest as it would be reasonably likely to impair the ability of the MHCC to obtain similar information in the future.

Section 31(1)(a) Law enforcement documents

Section 31(1)(a) exempts from disclosure documents that if released would be reasonably likely to prejudice the investigation of a possible breach of the law or prejudice the enforcement of proper administration of the law in a particular instance.

For similar reasons to the applicability of s35(1)(b), disclosure may have the effect of prejudicing the proper administration of the MH Act. That is, there may be a real and not fanciful or remote chance of that happening or it is something that might happen.

If the fullness, accuracy and quality of information provided is impaired, it could have an adverse impact in the administration of the MH Act. It may impede the MHCC in properly performing its statutory functions, including to endeavour to resolve complaints in a timely manner using formal and informal dispute resolution (s228(b) MH Act), to provide information, education and advice to services (s228(e) and (g) MH Act), and to identify, analyse and review quality, safety and other issues arising out of complaints and to provide information and make recommendations for improvement to services, the chief psychiatrist and other agencies listed (s228(j) MH Act).

Services also have a role in administering the MH Act, including in respect of ISP reports as they are required to provide information to the MHCC about the complaints received by them (s267 MH Act).

A number of services consulted about this matter responded that disclosure of information in the 'recommendations and service improvements' parts of the ISP reports would prejudice the administration of the MH Act. Disclosure would be likely to impede the fullness and quality of information provided to the MHCC and thus impede the MHCC's performance of its functions, and prejudice the reports made by services to the MHCC under s267 of the MH Act. One service stated that disclosure of information about undertakings made by services (under s243(4)(e) MH Act) would impair the ability of the MHCC to obtain undertakings from services and utilise undertakings in the administration of the MH Act.

Accordingly, I have decided that this exemption applies to the 'recommendations and service improvements' parts of the ISP reports that relate to individual complaints.

Section 30(1) Internal working documents

A document is exempt under s30(1) if release would disclose matter in the nature of opinion, advice, recommendation, consultation or deliberation, prepared in the course of, or for the purpose of, the deliberative processes involved in the functions of any agency or Minister of the government, and where disclosure would be contrary to the public interest.

The reports are internal working documents as they contain opinion, advice or recommendations by officers of the MHCC. They also would disclose opinion, advice or recommendations by officers of services who are agencies under the FOI Act. The reports are confidential and provided by the MHCC to each service. These communications are consistent with the statutory functions and powers of the MHCC under s228. They are also part of the deliberative processes of the MHCC and/or services and occur for the purposes of the deliberative functions of the MHCC and/or services.

The MHCC recognises that there is a public interest in disclosing information about the effectiveness of its complaints handling process and the exercise of its powers. This public interest needs to be balanced against the need to protect the confidentiality of the process which is essential to its effectiveness and fairness. It is critical that members of the public and mental health service providers can be confident that information shared with the MHCC will not be publicly disclosed unless expressly permitted by the MH Act. Disclosure of the 'recommendations and service improvement' parts of the ISP reports includes the risk of full and accurate

information not being provided in future, the impingement on privacy rights of individuals (and not just complainants) and the risk of prejudice to the administration of the statutory regime.

The MHCC's position is that the public interest in transparency about its functions is achieved by the disclosure of the ISP reports with the sections about 'recommendations and service improvements' being redacted – this achieves the correct balance of the public interest in transparency while protecting the privacy of individuals, the effectiveness of the MHCC's functions, and trust in the MHCC.

Further, the information in these reports is not 'purely factual information' for the purposes of s 30(3) as the reports include deliberative content including opinions, advice and recommendations with which any factual information is intertwined.

For these reasons, I have decided that s30(1) also applies to 'recommendations and service improvement' sections of the ISP reports.

Partial access (s25)

We propose to provide partial access to the documents although you have not stated that you seek access to the documents with exempt or irrelevant matter deleted (presumably because you expressed the view that no exemptions would apply).

Access charges waived

In this instance, I decided to waive the access charges that would otherwise have been payable.

Documents enclosed

Please find enclosed a schedule of documents and the decision in respect of each document.

The documents to which access has been granted were sent to you by post on 11 April 2022 (on a password protected USB) pursuant to the decision in response to your first request. Please advise if you require a further copy of the documents.

Your review rights

If you are not satisfied with my decision you have the right to apply for a review of my decision by the Victorian Information Commissioner under section 49A(1)(a) of the FOI Act. A review application must be in writing and must identify the decision to be reviewed. An application must be made to the Information Commissioner within 28 days of the date you receive this letter.

More information about applying for review by the Information Commissioner can be found at www.ovic.vic.gov.au/freedom-of-information/apply-for-a-review or by calling 1300 006 842.

Further info

To assist you in reviewing the ISP reports released to you please note the following:

- the reports are provided to services some time after the end of the relevant period due to the time required to enable data collection, quality assurance, review and analysis
- there may be changes in the taxonomy used between the reports that affects the ability to make comparisons
- errors have been identified in some of the reports; these errors were not corrected as the purpose was for internal purposes to the MHCC and services.

More information

If you have any questions about this letter, please contact me on 1800 246 054 or by email on PrivacyFOI@mhcc.vic.gov.au or help@mhcc.vic.gov.au.

Yours sincerely



Isabel Anton
Principal Legal Officer
Freedom of Information Officer

Enc. Schedule of documents

Schedule of documents

FOI request – F2022/005

Doc number	Description	Decision on access	Exemptions applied
Albury Wodonga Health			
1	2015 reports – 1 report	Released in full	Nil
2	2018 reports – 1 report	Released in full	Nil
3	2020 reports – 1 report	Released in part	s38, s33, s35(1)(b), s31(1)(a); s 30(1)
Alfred Health			
4	2015 reports – 1 report	Released in full	Nil
5	2018 reports – 1 report	Released in part	s38, s33, s35(1)(b), s31(1)(a); s 30(1)
6	2020 reports – 1 report	Released in part	s38, s33, s35(1)(b), s31(1)(a); s 30(1)
Austin Health			
7	2015 reports – 1 report	Released in full	Nil
8	2018 reports – 1 report	Released in part	s38, s33, s35(1)(b), s31(1)(a); s 30(1)
9	2020 reports – 1 report	Released in part	s38, s33, s35(1)(b), s31(1)(a); s 30(1)
Ballarat Health Services			
10	2015 reports – 1 report	Released in full	Nil
11	2018 reports – 1 report	Released in part	s38, s33, s35(1)(b), s31(1)(a); s 30(1)
12	2020 reports – 1 report	Released in part	s38, s33, s35(1)(b), s31(1)(a); s 30(1)
Barwon Health			
13	2015 reports – 1 report	Released in full	Nil
14	2018 reports – 1 report	Released in part	s38, s33, s35(1)(b), s31(1)(a); s 30(1)
15	2020 reports – 1 report	Released in part	s38, s33, s35(1)(b), s31(1)(a); s 30(1)
Bendigo Health Care Group			
16	2015 reports – 1 report	Released in full	Nil
17	2018 reports – 1 report	Released in part	s38, s33, s35(1)(b), s31(1)(a); s 30(1)
18	2020 reports – 1 report	Released in part	s38, s33, s35(1)(b), s31(1)(a); s 30(1)
Eastern Health			
19-22	<i>2015 reports</i>		
	19 Eastern (combined)	Released in full	Nil
	20 Aged		
	21 Central East		
	22 Outer East		
23-27	<i>2018 reports</i>		
	23 Eastern (combined)	Released in part	s38, s33, s35(1)(b), s31(1)(a); s 30(1)
	24 Central East	Released in part	s38, s33, s35(1)(b), s31(1)(a); s 30(1)
	25 Outer East	Released in part	s38, s33, s35(1)(b), s31(1)(a); s 30(1)
	26 CAMHS	Released in full	Nil
	27 Aged	Released in full	Nil
28-32	<i>2020 reports</i>		
	28 Eastern (combined)	Released in part	s38, s33, s35(1)(b), s31(1)(a); s 30(1)
	29 Central East	Released in full	Nil
	30 Outer East	Released in part	s38, s33, s35(1)(b), s31(1)(a); s 30(1)
	31 CYMHS	Released in full	Nil
	32 Aged	Released in part	s38, s33, s35(1)(b), s31(1)(a); s 30(1)
Forensicare			
33	2015 reports – 1 report	Released in full	Nil
34	2018 reports – 1 report	Released in part	s38, s33, s35(1)(b), s31(1)(a); s 30(1)
35	2020 reports – 1 report	Released in part	s38, s33, s35(1)(b), s31(1)(a); s 30(1)
Goulburn Valley Health			
36	2015 reports – 1 report	Released in full	Nil
37	2018 reports – 1 report	Released in full	Nil
38	2020 reports – 1 report	Released in part	s38, s33, s35(1)(b), s31(1)(a); s 30(1)

Doc number	Description	Decision on access	Exemptions applied
Latrobe Regional Hospital			
39	2015 reports – 1 report	Released in full	Nil
40	2018 reports – 1 report	Released in part	s38, s33, s35(1)(b), s31(1)(a); s 30(1)
41	2020 reports – 1 report	Released in part	s38, s33, s35(1)(b), s31(1)(a); s 30(1)
Melbourne Health			
<i>42-48</i>	<i>2015 reports</i>		
	42 Melb Health (combined)	Released in full	Nil
	43 Mid West		
	44 Inner West		
	45 North West		
	46 Northern		
	47 Aged		
	48 Orygen		
<i>49-55</i>	<i>2018 reports</i>		
	49 Melb Health (combined)	Released in part	s38, s33, s35(1)(b), s31(1)(a); s 30(1)
	50 Mid West	Released in part	s38, s33, s35(1)(b), s31(1)(a); s 30(1)
	51 Inner West	Released in part	s38, s33, s35(1)(b), s31(1)(a); s 30(1)
	52 North West	Released in full	Nil
	53 Northern	Released in part	s38, s33, s35(1)(b), s31(1)(a); s 30(1)
	54 Aged	Released in full	Nil
	55 Orygen	Released in full	Nil
<i>56-62</i>	<i>2020 reports</i>		
	56 Melb Health (combined)	Released in part	s38, s33, s35(1)(b), s31(1)(a); s 30(1)
	57 Mid West	Released in part	s38, s33, s35(1)(b), s31(1)(a); s 30(1)
	58 Inner West	Released in part	s38, s33, s35(1)(b), s31(1)(a); s 30(1)
	59 North West	Released in full	Nil
	60 Northern	Released in part	s38, s33, s35(1)(b), s31(1)(a); s 30(1)
	61 Aged	Released in part	s38, s33, s35(1)(b), s31(1)(a); s 30(1)
	62 Orygen	Released in part	s38, s33, s35(1)(b), s31(1)(a); s 30(1)
Mercy Public Hospitals Incorporated (Werribee Mercy Mental Health Program)			
63	2015 reports – 1 report	Released in full	Nil
64	2018 reports – 1 report	Released in part	s38, s33, s35(1)(b), s31(1)(a); s 30(1)
65	2020 reports – 1 report	Released in part	s38, s33, s35(1)(b), s31(1)(a); s 30(1)
Mildura Base Hospital			
66	2015 reports – 1 report	Released in full	Nil
67	2018 reports – 1 report	Released in full	Nil
68	2020 reports – 1 report	Released in full	Nil
Monash Health			
<i>69-73</i>	<i>2015 reports</i>		
	69 Casey	Released in full	Nil
	70 Dandenong		
	71 Clayton (Middle South)		
	72 Clayton (Child & Adolescent)		
	73 Aged		
<i>74-78</i>	<i>2018 reports</i>		
	74 Monash (combined)	Released in part	s38, s33, s35(1)(b), s31(1)(a); s 30(1)
	75 Casey	Released in part	s38, s33, s35(1)(b), s31(1)(a); s 30(1)
	76 Dandenong	Released in part	s38, s33, s35(1)(b), s31(1)(a); s 30(1)
	77 Clayton (Middle South)	Released in part	s38, s33, s35(1)(b), s31(1)(a); s 30(1)
	78 ELMHS	Released in full	Nil
<i>79-84</i>	<i>2020 reports</i>		
	79 Monash (combined)	Released in part	s38, s33, s35(1)(b), s31(1)(a); s 30(1)
	80 Casey	Released in part	s38, s33, s35(1)(b), s31(1)(a); s 30(1)
	81 Dandenong	Released in part	s38, s33, s35(1)(b), s31(1)(a); s 30(1)

Doc number	Description	Decision on access	Exemptions applied
	82 Clayton (Middle South)	Released in full	Nil
	83 ELMHS	Released in full	Nil
	84 Aged	Released in part	s38, s33, s35(1)(b), s31(1)(a); s 30(1)
Peninsula Health			
85	2015 reports – 1 report	Released in full	Nil
86	2018 reports – 1 report	Released in part	s38, s33, s35(1)(b), s31(1)(a); s 30(1)
87	2020 reports – 1 report	Released in part	s38, s33, s35(1)(b), s31(1)(a); s 30(1)
Royal Children's Hospital			
88	2015 reports – 1 report	Released in full	Nil
89	2018 reports – 1 report	Released in part	Nil
90	2020 reports – 1 report	Released in part	Nil
South West Healthcare			
91	2015 reports – 1 report	Released in full	Nil
92	2018 reports – 1 report	Released in part	s38, s33, s35(1)(b), s31(1)(a); s 30(1)
93	2020 reports – 1 report	Released in part	s38, s33, s35(1)(b), s31(1)(a); s 30(1)
St Vincent's Hospital			
94	2015 reports – 1 report	Released in full	Nil
95	2018 reports – 1 report	Released in part	s38, s33, s35(1)(b), s31(1)(a); s 30(1)
96	2020 reports – 1 report	Released in part	s38, s33, s35(1)(b), s31(1)(a); s 30(1)