

GUIDE TO SECTION 33

Documents affecting personal privacy

Elements of the exemption

A document is exempt under section 33(1) of the FOI Act if two conditions are satisfied –

- > disclosure of the document under the FOI Act must ‘involve’ the disclosure of information relating to the ‘personal affairs’ of a person; and
- > such disclosure must be ‘unreasonable’.

Does the document contain personal affairs information?

Section 33(9) makes it clear that information relating to the ‘personal affairs’ of a person includes information that identifies any person or discloses their address or location or by which this can be reasonably determined.

Keep in mind that, whilst on its face the information may not appear identifying, the applicant may already have certain information that, when combined with the information in the document, is identifying.

Section 33(2) provides that any material contained in a document that relates solely to the applicant’s personal affairs is not exempt under section 33(1).

The personal affairs information of a deceased person is still considered the personal affairs information of that person, even though the third party is deceased.

Consider

Does the information relate to a natural person?

Is the information identifying? Who does the personal information relate to?

Does the material relate solely to the applicant’s personal affairs?

Section 33(1) can only apply to natural persons – for instance, the name of a company would not fall under the section 33 exemption.

Mond v Building Commission of Victoria [2012] VCAT 796

In certain circumstances, the personal affairs information comprises statements that the author attributes to a third party, for instance, where the author of the document recounts a conversation with a third party or a statement by a third party.

In *Mond*, the applicant requested documents containing information relating to a complaint they had made to the Building Commission, regarding a builder and a draftsman.

The documents disclosed that certain individuals were involved in the complaint, and included an account of their behaviour. There were also expressions of personal views about the matter under investigation and descriptions of work practices of an individual.

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Mond (continued)

VCAT compared previous decisions on similar circumstances, and held that –

- In some cases, a written expression of opinion by a third party to a respondent about an applicant's conduct relates to the author's personal affairs
- Where opinions are provided by persons in their professional capacity, such opinions are part of their public, rather than private lives, and therefore do not relate to their personal affairs (other exemptions, such as section 30, may apply to this information instead)
- Parts of an account of the behaviour of other persons may relate to the personal affairs of those other persons
- One person's version of events and experiences related to their work, or a description of usual work practices, does not necessarily relate to that person's personal affairs.

Adopting the approach of VCAT requires a close reading of the document, to determine whether the information is the personal affairs information of the author or the personal affairs information of the third party.

Consultation with third parties

The *Freedom of Information Act 1982*, has been amended¹ to include new third party consultation and notification requirements for a number of exemptions.

Agencies and Ministers are required under s 33(2B) to consult with any person who is the subject of the personal affairs information contained in a document, and seek their views as to whether disclosure of the document should occur.

Consultation is required even where the decision maker does not propose to grant access to a document.

Where a decision maker is required to consult a third party, the agency or Minister:

- > must have regard to the views of third parties before making a decision; and
- > may decide to extend the time for making a decision by up to 15 calendar days (see our guide to 'Time for Deciding Access Requests, including Extensions of Time' for more detail).

A third party's objection does not mean that a document must not be released (that is, they do not have the ability to veto release). A third party's views must be considered along with other relevant considerations.

Consultation is not required under s 33 where an agency or Minister is satisfied that consultation would be reasonably likely to –

- > endanger the life or physical safety of the relevant third party;
- > cause the relevant third party undue distress; or
- > otherwise be unreasonable in the circumstances; or
- > it is not practicable to do so.

For further guidance, see the Commissioner's fact sheet on 'Consultation and Notification'.

Is disclosure of the personal affairs information unreasonable?

After seeking the views of any relevant third party, you must go on to consider whether disclosure of that personal affairs information is unreasonable in the circumstances.

It is important to begin from a position that the applicant is entitled to access the documents and to only delete information when disclosure would be unreasonable.

The main factors to consider when deciding whether disclosure of the personal affairs is unreasonable include –

- > The circumstances in which the information was obtained;

¹ As amended by the *Freedom of Information Amendment (Office of the Victorian Information Commissioner) Act 2017*.

- > The applicant's interest in the information to be disclosed;
- > The nature of the information to be disclosed and the information which has already been disclosed or is on the public record;
- > Whether the individuals whose personal affairs are included in the documents would be likely to object to the release of that information;
- > Whether any public interest would be promoted by the release of the information;
- > The likelihood of further disclosure of the personal information, if it is released. Under the FOI Act, there is no provision for conditional release; and
- > Whether the disclosure of information relating to the personal affairs of any person would, or would be reasonably likely to, endanger the life or physical safety of any person, as required by section 33(2A) of the FOI Act.
- > Any response received following consultation with a relevant third party under section 33(2B) of the FOI Act.

Tip

Assess each of the factors to determine what is relevant and persuasive.

It is important to begin from a position that the applicant is entitled to access the documents and to only delete information when disclosure would be unreasonable.

When the documents concern the personal affairs information of a deceased person, the deceased person's rights are conferred on the deceased's next-of-kin. As such, instead of considering whether the deceased individual would object, you need to consider the opinion of the next-of-kin.

Third Party Notification

If, following consultation under section 33(2B), a decision maker decides to release all or part of a document, they must notify any third party that objected to disclosure of their right to seek review of their decision by VCAT.

There is no requirement to notify a third party that has consented to disclosure, provided the decision is not to disclose more material than the third party agreed to.

FOI decision makers should also notify the applicant that the document will only be released when the third party's 60 day review period has expired.

For further guidance, see the Commissioner's fact sheet on 'Consultation and Notification'.

The application of section 25

Section 25 of the FOI Act requires an agency or Minister to grant access to a copy of a document containing exempt matter or irrelevant material if it is practicable for the agency or Minister to delete the exempt or irrelevant matter, and an applicant indicates that he or she would wish to have access to such a copy.

There are two factors to consider when determining whether it is 'practicable' to delete exempt or irrelevant matter and grant access to the redacted copy of a document. The two necessary considerations are –

- > The ease with which the agency or Minister is able to make deletions to the document in order to make it not exempt; and
- > The efficacy of the outcome of making such deletions; that is, whether the redacted document is meaningful.

If the redacted document retains its meaning after redacting any exempt material, you should consider using section 25.

However, often non-exempt material is intertwined with exempt material to such a degree that it cannot be separated. In these circumstances, it would not be practicable to provide an applicant with an edited copy of such a document. This includes cases where –

- > The applicant's personal affairs information is intertwined with a third party's personal affairs information; or
- > Other exempt material is intertwined with a third party's personal affairs information.

Sometimes, deleting all of the exempt material in the document will have the effect of rendering a document meaningless. Again, it would not be practicable to provide the applicant with a copy of such a document.

Further Information

Visit our website, call or email us:

- > www.ovic.vic.gov.au
- > 1300 842 364 (1300 VIC FOI)
- > enquiries@foicommissioner.vic.gov.au

Other related fact sheets include:

- > Guide to Consultation and Notification
- > Consultation and Notification Flowchart
- > Overview of the Amendments Guide

Disclaimer: This fact sheet does not constitute legal advice and should not be used as a substitute for applying the provisions of the Freedom of Information Act 1982, or any other legal requirement, to individual cases.