

## Notice of Decision and Reasons for Decision

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Applicant:	'AE5'
Agency:	Department of Health and Human Services
Decision Date:	30 May 2019
Exemption considered:	Section 33(1)
Citation:	'AE5' and Department of Health and Human Services ( <i>Freedom of Information</i> ) [2019] VICmr 41 (30 May 2019)

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FREEDOM OF INFORMATION – employee grievance file – Worksafe inspection report – unreasonable to release third party personal affairs information – non-executive agency officers reasonably likely to object to disclosure

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 is the same as the Agency's decision in that I have decided to release the documents in part.

My reasons for decision follow.

**Joanne Kummrow**  
Public Access Deputy Commissioner  
30 May 2019

## Reasons for Decision

### Background to review

1. The Applicant made a request to the Agency for access to certain documents. Following consultation with the Agency, the Applicant amended the initial request.
2. The amended request was for access to the following documents:
  1. a copy of my grievance file
  2. a copy of the 2017 and 2018 People Matter Survey results
  3. peer reviews concerning me by staff at [named workplace] from [date range] to [date range].
  4. peer reviews concerning me by staff at [named workplace] from [date range] to [date range].
  5. a copy of a Work Safe Report ([date]) into the occupation health safety concerns I raised over [relating to] [redated] [named workplace].
3. In its decision, the Agency identified 94 pages of documents falling within the terms of the Applicant's request. It decided to release 84 pages in full and 10 pages in part. In reference to category 4 above, the Agency stated in its decision that it does not hold any record of peer reviews.

### Review

4. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
5. On 11 April 2019, the Applicant indicated during a telephone discussion with OVIC staff that access is not sought to Agency officers' telephone numbers, addresses, email addresses or signatures and any personal affairs information relating to WorkSafe officers. Accordingly, this information is to remain deleted as it is not relevant to the review.
6. Therefore, the review relates to the names of non-executive Agency officers to which the Agency denied access.
7. I have examined copies of the documents subject to review.
8. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
9. I have considered all communications and submissions received from the parties, including:
  - (a) the Agency's decision on the FOI request;
  - (b) the Applicant's submission dated 19 February 2019 and information provided with the Applicant's review application;
  - (c) the Agency's submission dated 19 February 2019; and
  - (d) all other communications with the Applicant and the Agency.
10. 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 government or other public bodies, limited only by

exceptions and exemptions necessary to protect essential public interests, privacy and business affairs.

### **Review of exemptions**

11. The Agency relied on the exemption under section 33(1) to refuse access to parts of the documents. The Agency's decision letter sets out the reasons for its decision.

### **Submissions**

12. The Agency in its submission, advised:
  - (a) The department has a duty to protect the privacy of its employees and other agency employees.
  - (b) The exemption has been applied to personal identifying information of non-executive Agency officers.
  - (c) Non-executive Agency officers are generally employed with the understanding they do not have the skills or authority to act on behalf of the Agency and to be accountable for its decision making (as opposed to executive officers, who may be authorised to represent the Agency).
  - (d) Non-executive Agency officers, therefore, work under the assumption their identities and contact information will not be released to the public.
  - (e) It is inherently stressful for non-executive Agency officers to have their identities and contact information released to the public.
  - (f) In relation to the application of section 33(1) to the personal affairs information of non-executive Agency officers, the Agency referred to the Victorian Civil and Administrative Tribunal (**VCAT**) decision, *Coulson v Department of Premier and Cabinet*,<sup>1</sup> and quoted the following passage from that decision:

With the passage of years since those decisions and the increasing prominence of rights of privacy, in my view an approach regarding disclosure of the names of staff holding non-executive positions as unreasonable is the correct and preferable approach.
  - (g) The Agency relies on the above case to support its view the names, positions and contact details of non-executive Agency officers in the documents are exempt under section 33(1).
13. The Applicant also made a confidential submission to OVIC addressing the Agency's decision. I acknowledge the Applicant's personal interest in obtaining access to information that concerns them.

### **Section 33(1)**

14. 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;<sup>2</sup> and
  - (b) such disclosure would be 'unreasonable'.

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<sup>1</sup> [20018] VCAT 229.

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

15. 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>3</sup>
16. In deciding whether the exemption applies, it is necessary to determine whether disclosure of personal affairs information would be unreasonable. Consideration of whether disclosure would be unreasonable involves balancing the public interest in the disclosure of official information with the personal interest in privacy in the particular circumstances of a matter.
17. While I note the VCAT decision of *Coulson v Department of Premier and Cabinet* quoted above, is consistent with the objects of the FOI Act, I adopt the view expressed by the Victorian Court of Appeal in *Victoria Police v Marke*,<sup>4</sup> in which it was held there is 'no absolute bar to providing access to documents which relate to the personal affairs of others', and 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'.
18. As also stated in *Victoria Police v Marke*, '[t]he protection of privacy, which lies at the heart of s 33(1), is an important right that the FOI Act properly protects. However, an individual's privacy can be invaded to a lesser or greater degree'.<sup>5</sup>
19. I acknowledge the Applicant may already know some of the third parties named in the documents. However, 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>6</sup>
20. The proper application of section 33(1) involves consideration of 'all matters relevant, logical and probative to the existence of conditions upon which the section is made to depend'.<sup>7</sup>
21. In this case, I have considered the following factors<sup>8</sup> when determining if the release of the personal affairs information in the documents would be unreasonable in the circumstances:
  - (a) the nature of the personal affairs information that would be disclosed;
  - (b) the circumstances in which the information was obtained;
  - (c) the Applicant's interest in the information;
  - (d) the likelihood of further disclosure of the information, if released;
  - (e) whether the individuals to whom the information relates object, or would be likely to object to the release of the information;
  - (f) whether disclosure would cause the individuals stress, anxiety or embarrassment;
  - (g) whether the information has any current relevance; or
  - (h) whether disclosure would, or would be reasonably likely to, endanger the life or physical safety of any person.

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<sup>3</sup> Section 33(9).

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

<sup>5</sup> [2008] VSCA 218 at [79].

<sup>6</sup> *AB v Department of Education and Early Childhood Development* [2011] VCAT 1263 at [58]; *Akers v Victoria Police* [2003] VCAT 397.

<sup>7</sup> [2008] VSCA 218 at [104].

<sup>8</sup> A number of these factors were identified in *Page v Metropolitan Transit Authority* (1988) 2 VAR 243.

22. The nature of disclosure of a document under the FOI Act is unconditional and unrestricted, which means an applicant is free to disseminate widely or use a document as they choose.<sup>9</sup>
23. Section 33(2B) requires that, in deciding whether the disclosure of a document under the FOI Act would involve the unreasonable disclosure of information relating to the personal affairs of any person, the agency must:
  - (a) notify the person who is the subject of that information (or if that person is deceased, that person's next of kin), that the agency has received a request for access to the document;
  - (b) seek that person's view as to whether disclosure of the document should occur; and
  - (c) state that if the person consents to disclosure of the document, or disclosure subject to deletion of information relating to the personal affairs of the person, the person is not entitled to apply to the Tribunal for review of a decision to grant access to that document.
24. However, compliance with the consultation requirements under section 33(2B) is not required in certain circumstances. This includes if the notification would be reasonably likely to cause that person undue distress or is otherwise unreasonable or it is not practicable to do so in the circumstances.<sup>10</sup>
25. In this case, the Agency did not consult with third parties whose personal affairs information was exempted in the documents to obtain their views on disclosure. The primary reason given by the Agency was it considered consultation was not practicable due to the individuals' junior positions and the reasonable expectation they would not want to be publicly identified through disclosure of the documents when carrying out their usual work duties at that level. However, in my view, consultation by the Agency would have been practicable and, as intended by the introduction of this requirement into the FOI Act, allows an agency to take into consideration the views of persons whose personal affairs information is sought.
26. The Agency's submits non-executive Agency officers are unlikely to have the authority to act on behalf of the Agency and be accountable for its decision making and, therefore, should not necessarily be subject to the same level of public scrutiny as more senior Agency employees.
27. In most cases, the disclosure of an agency officer's name where they are carrying out their usual duties in a work capacity may relate more to their professional or work profile, rather than their personal or private life. However, in this case, I accept investigations into workplace issues and matters that raise issues of employee conduct within an agency or organisation are inherently sensitive in nature. Therefore, given the context in which non-executive Agency officers are named in the documents, I accept there is concern about their names being disclosed in the documents.
28. In this case, the Agency released the majority of information in the documents, which constitutes the substantive information sought by the Applicant. In addition, the documents are approximately five years old and concern matters of limited ongoing relevance or would engage the broader interest of the public. Both of these factors, in my view, weigh against disclosure of the personal affairs information of the Agency officers in the documents. While in some contexts it will be reasonable to release such information, in the circumstances, I have determined release would not be reasonable. Therefore, I am of the view there is no public interest that would be promoted by release of the personal affairs information in this instance.

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<sup>9</sup> [2008] VSCA 218 at [68].

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

29. I also accept the Agency officers named in the documents would be reasonably likely to object to the release of their personal affairs information to the Applicant given the nature of the documents sought. However, while this factor weighs against disclosure, it is not a wholly determinative factor.
30. There is no information before me to indicate release of the information is reasonably likely to endanger the life or physical safety of any person.<sup>11</sup>
31. I am satisfied it would be unreasonable in all the circumstances to release the names of non-executive Agency officers in the documents. Accordingly, the personal affairs information deleted by the Agency in the documents is exempt under section 33(1).

### ***Deletion of exempt or irrelevant information***

32. Section 25 requires an agency to grant access to an edited copy of a document when it is practicable for the agency or Minister to delete exempt or irrelevant information and the applicant agrees to receiving such a copy.
33. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'<sup>12</sup> and the effectiveness of the deletions. Where deletions would render the document meaningless they are not 'practicable' and release of the document is not required under section 25.<sup>13</sup>
34. I have considered the information the Agency deleted from the documents as irrelevant. I agree it falls outside the scope of the Applicant's request because it relates to matters other than those specified in the request.
35. I have considered the effect of deleting irrelevant and exempt information from the documents. In my view, it is practicable for the Agency to delete the irrelevant and exempt information, because it would not require substantial time and effort, and the edited documents would retain meaning.

### ***Conclusion***

36. On the information available, I am satisfied the exemption in section 33(1) applies to the names of non-executive Agency officers in the documents and this information should remain deleted.
37. Also, as previously discussed, any information relating to Agency officers' telephone numbers, addresses, email addresses or signatures is irrelevant to the review and is to remain deleted.
38. As it is practicable for the Agency to edit the documents to delete irrelevant and exempt information, I have determined to grant access to the documents in part.

### ***Review rights***

39. If either party to this review is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.<sup>14</sup>
40. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.<sup>15</sup>

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<sup>11</sup> Section 33(2A).

<sup>12</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>13</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] and [155].

<sup>14</sup> The Applicant in section 50(1)(b) and the Agency in section 50(3D).

<sup>15</sup> Section 52(5).

41. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.<sup>16</sup>
42. 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.
43. 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>17</sup>

***When this decision takes effect***

44. My decision does not take effect until the relevant review period (stated above) expires, or if either party applies to VCAT for a review, until the VCAT proceeding is concluded.

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<sup>16</sup> Section 52(9).

<sup>17</sup> Sections 50(3F) and (3FA).