

## Notice of Decision and Reasons for Decision

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Applicant:	'AF9'
Agency:	Department of Justice and Community Safety
Decision Date:	20 June 2019
Exemptions considered:	Sections 30(1), 31(1)(a), 33(1), 35(1)(b), 38
Citation:	'AF9' and Department of Justice and Community Safety (Freedom of Information) [2019] VICmr 54 (20 June 2019)

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FREEDOM OF INFORMATION – register of exempt businesses under *Sex Work Act 1994* – whether release would breach a statutory secrecy provision – whether release of small datasets could reasonably identify individuals – whether release of information which identifies sex workers would be unreasonable

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 in that I have decided to release Document 1 in part, but agree that Document 2 is to be refused in full.

The Schedule of Documents in **Annexure 1** sets out my decision in relation to each document.

My reasons for decision follow.

Sven Bluemmel  
Information Commissioner

20 June 2019

## Reasons for Decision

### Background to review

1. The Applicant made a request to the Agency for access to the following documents:

Documents that reveal the number of sex workers (exempt) on the Register as of [specified date] who operate a brothel according to the definition in section 3 of the Sex Work Act. Documents that reveal the date of the most recent meeting of the Sex Work Ministerial Advisory Committee. Please [note] that I am willing to accept partial access to these documents. I am also willing to accept edited copies of these documents.

2. In its decision, the Agency identified a document falling within the terms of the Applicant's request, and created another under section 19. It decided to refuse access to both documents in full.

### Review

3. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
4. I have examined copies of the documents subject to review.
5. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
6. I have considered all communications and submissions received from the parties, including:
  - (a) the Agency's decision on the FOI request;
  - (b) information provided with the Applicant's review application;
  - (c) the Applicant's submissions dated 20 May 2019;
  - (d) the Agency's submissions dated 7 June 2019.
7. As part of [their] submissions, the Applicant indicated that [they] did not seek personal affairs information of any individuals. As discussed below, the Agency has decided that release of Document 2 could identify individuals. The Applicant disputes this. I will therefore still discuss whether that information should be released as opposed to removing it from the scope of my review.
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.

### Review of exemptions

9. The Agency relied on the following exemptions to refuse access to the documents: sections 30(1), 31(1)(a), 33(1) and 38 in conjunction with provisions of the *Business Licensing Authority Act 1998* (Vic) (**BLA Act**). The Agency's decision letter sets out the reasons for its decision.

### **Section 30(1)**

10. The Agency applied section 30(1) to Document 1 in full, which it claimed was a draft.
11. As part of its submissions dated 7 June 2019 the Agency indicated it no longer sought to uphold the exemption to information in the document showing the date of the meeting. It submitted that the remainder of the information is irrelevant to the request.
12. Given the terms of the Applicant's request, I am of the view that the remainder of the information in the document (namely the draft contents of the minutes) is outside the scope of the request, and therefore irrelevant, as submitted by the Agency.
13. As discussed below in relation to section 25, I am satisfied that it is practicable to delete the irrelevant information. In this case, that is everything other than the date of the meeting.
14. As a result, I am of the view that Document 1 can be released in part.

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

15. 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>1</sup> and
  - (b) such disclosure would be 'unreasonable'.
16. 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>2</sup>
17. The concept of 'unreasonable disclosure' involves balancing the public interest in the disclosure of official information with the personal interest in privacy in the particular circumstances of a matter.
18. Section 33(2A) requires that, in deciding whether the disclosure of a document would involve the unreasonable disclosure of information relating to the personal affairs of any person, I must take into account whether the disclosure of the information would, or would be reasonably likely to, endanger the life or physical safety of any person. However, I do not consider this to be a relevant factor in the circumstances.
19. In deciding whether disclosure of a document would involve the unreasonable disclosure of a third party's personal affairs information, an agency must notify that person (or their next of kin, if deceased) an FOI request has been received for documents containing their personal information and seek their view as to whether disclosure of the document should occur.<sup>3</sup> However, this obligation does not arise if:
  - (a) the notification would be reasonably likely to endanger the life or physical safety of a person, or cause them undue distress, or is otherwise unreasonable in the circumstances;
  - (b) the notification would be reasonably likely to increase the risk to the safety of a person experiencing family violence; or
  - (c) it is not practicable to do so.<sup>4</sup>

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

<sup>2</sup> Section 33(9).

<sup>3</sup> Section 33(2B).

<sup>4</sup> Section 33(2C).

20. The Agency did not advise if it undertook consultation with individuals as required.
21. The document contains a description of the data sought by the Applicant and that data as a discrete number. As advised by the Agency in its decision letter, the number is [redacted].
22. That figure represents individuals who are on a register maintained as part of the operation of the *Sex Work Act 1994 (Vic)* (**Sex Work Act**).
23. Section 22 of the Sex Work Act requires individuals who carry on business as a sex work service provider (as defined by that Act) to be licenced.
24. Section 23 of the Sex Work Act sets out situations where a sex work service provider in an owner-operated business is exempt from the requirement to have a licence. This includes individuals in the category in the scope of the Applicant's request.
25. Section 24 of the Sex Work Act states that individuals who are exempt from the requirement to have a licence must be included on a register maintained under that Act. It is the number of individuals in a certain category in that register which is sought by the Applicant.
26. I first must be satisfied that the information in the document would reasonably identify an individual, as stated in section 33(9).
27. The Victorian Civil and Administrative Tribunal (**VCAT**) has discussed a similar issue in a previous case (**Roberts**).<sup>5</sup> In that case, VCAT heard evidence from a senior police officer who had consulted with data analytics specialists and a senior officer of the Business Licensing Authority who maintains the register.
28. Their evidence was that they had been informed release of datasets that contain less than ten individuals raised the strong proposition that the data, when matched with other potentially available datasets, or with further investigation, could lead to the identification of those individuals.
29. The judgment does not note whether this evidence was tested under cross examination, or any evidence to the contrary led by the applicant in that case. In the circumstances of this review I consider that the evidence is relevant to my determination.
30. While VCAT did not have to decide whether this information would identify individuals, it is noted that the applicant accepted that a number of individuals less than ten 'might raise an issue'.<sup>6</sup>
31. VCAT has also approved the proposition that similarly small-sample datasets may identify individuals in the case of *Department of Health & Human Services v Herald and Weekly Times Pty Ltd*.<sup>7</sup>
32. On the basis of the above, I am satisfied that release of Document 2 could reasonably identify individuals.
33. I also must be satisfied that release of the information would be unreasonable.
34. The information is highly sensitive, and was received as part of the administration of the Sex Work Act and was provided in confidence. It is not information which is publicly available, as the Sex Work Act limits access to the register. This weighs against disclosure.

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<sup>5</sup> *Roberts v Department of Justice and Regulation* [2018] VCAT 1560

<sup>6</sup> *ibid* at [51]

<sup>7</sup> [2015] VCAT 906 at [20]

35. In *Roberts*, VCAT also heard evidence that if information about sex workers were to be released it would have the potential to expose them to risk or harm, including from members of organised crime networks. In my view this consideration is also relevant to section 33(2A). This also weighs against disclosure.
36. Given the nature of the information, I am of the view that it would be likely that the workers in the category would likely object to release of their personal affairs information. This, too, weighs against disclosure.
37. The Applicant, as part of [their] submissions, argued that in *Roberts*, VCAT had rejected arguments that information in the documents would be exempt under section 33(1). VCAT's decision in that case only related to whether all documents falling under the terms of the request would be exempt, by only looking at the terms of the request and not the documents themselves. There, they found that certain information, namely a much larger data set, would likely not be exempt. As noted above, VCAT did not have to make a decision definitively on whether small datasets under 10 would be exempt under section 33(1).
38. On balance, taking into account all of the information above, I consider that release of the information would be unreasonable in the circumstances. As a result, the information is exempt under section 33(1).

### **Section 38**

39. Section 38 provides:

#### **38 Documents to which secrecy provisions of enactments apply**

A document is an exempt document if there is in force an enactment applying specifically to information of a kind contained in the document and prohibiting persons referred to in the enactment from disclosing information of that kind, whether the prohibition is absolute or is subject to exceptions or qualifications.

40. For section 38 to apply to an enactment, the enactment must be formulated with such precision that it specifies the actual information sought to be withheld.

### **BLA Act**

41. Section 24 of the Sex Work Act describes the manner in which the register is to be kept, namely that at a certain time, relevant workers must provide certain details, including their identity, to the Business Licensing Authority.
42. Section 18 of the BLA Act provides as follows:
  - (1) This section applies to every person who is or has been a member of the Authority, the Registrar, a Deputy Registrar, a member of the other staff assisting the Authority, a person whose services are used by the Authority under section 7(2) or a person engaged under section 8.
  - (2) A person to whom this section applies must not, either directly or indirectly, make a record of, or disclose or communicate to any person, any information concerning the affairs of any person acquired by reason of the office or employment under or for the purposes of this Act or a business licensing Act.

Penalty: 5 penalty units.

43. I am satisfied section 18 of the BLA Act is a secrecy provision to which section 38 applies as:
- (a) the BLA Act is an enactment in force;
  - (b) section 18(2) of the BLA Act identifies, with precision, the type of information to which it applies (namely information concerning the affairs of any person acquired in the circumstances described); and
  - (c) section 18(2) of the BLA Act clearly prohibits the people specified in section 18(1) of the BLA Act from disclosing the information to which it applies.
44. As discussed above, I am of the view that release of Document 2 would disclose personal affairs information as defined by the FOI Act. While the description of the type of information for which release is prohibited is slightly different in section 18(2) of the BLA Act, I am of the view that in the circumstances it is functionally the same as personal affairs information in the FOI Act.
45. There is no information before me to suggest that any of the exceptions in section 18(3) of the BLA Act authorise disclosure of the documents to the Applicant in this instance.
46. Accordingly, I am satisfied that Document 2 is also exempt under section 38.
47. In light of my decision, it is not necessary for me to consider the additional exemptions relied on by the Agency.

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

48. 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.
49. Determining what is ‘practicable’ requires consideration of the effort and editing involved in making the deletions ‘from a resources point of view’<sup>8</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>9</sup>
50. I have considered that information, other than the date of the meeting in Document 2, is irrelevant. I agree it falls outside the scope of the Applicant’s request because that is the only information [they have] requested.
51. I have considered the effect of deleting irrelevant information from the Document 2. 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.
52. However, in relation to Document 1, as described, the only information contained is a description of the information sought by the Applicant and the number representing the dataset. I have determined that the figure is exempt, and I do not consider that the description alone would carry sufficient meaning in the context of the request when divorced from the figure. Document 1 is therefore exempt in full.

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<sup>8</sup> *Mickelborough v Victoria Police (General)* [2009] VCAT 2786 [31]; *The Herald and Weekly Times Pty Limited v The Office of the Premier (General)* [2012] VCAT 967 [82].

<sup>9</sup> *Honeywood v Department of Human Services* [2006] VCAT 2048 [26]; *RFJ v Victoria Police FOI Division (Review and Regulation)* [2013] VCAT 1267 [140], [155].

## **Conclusion**

53. On the information available, I am satisfied the exemptions in sections 33(1) and 38 apply to Document 2, but that the relevant information in Document 1 is not exempt. I have decided to grant access to Document 1 in part and refuse access in full to Document 2.

## **Review rights**

54. If either party to this review is not satisfied with my decision, they are entitled to apply to the VCAT for it to be reviewed.<sup>10</sup>
55. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.<sup>11</sup>
56. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.<sup>12</sup>
57. 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.
58. 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>13</sup>

## **When this decision takes effect**

59. 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>10</sup> The Applicant in section 50(1)(b) and the Agency in section 50(3D).

<sup>11</sup> Section 52(5).

<sup>12</sup> Section 52(9).

<sup>13</sup> Sections 50(3F) and (3FA).

## Annexure 1

Document No.	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
1.	Draft Advisory Committee Meeting minutes	5	Refused in full  Section 30(1)	Released in part  Irrelevant information to be deleted under section 25. That is, everything other than the date of the meeting is to be deleted.  Only the date of the meeting is to be released.	<b>Section 30(1):</b> The Agency advised it no longer sought to apply the exemption to the date of the meeting. It can therefore be released.  I consider that the rest of the information in the document is irrelevant to the Applicant's request, and that the document is practicable to edit in the circumstances.
2.	Document created under s19 showing relevant number of sex workers on the Register	1	Refused in full  Sections 31(1)(a), 33(1), 35(1)(b), 38	Refused in full  Sections 38, 33(1)	<b>Section 33(1):</b> The document contains a figure representing a small dataset which, if released, could identify individuals within that dataset. Given the high sensitivity of the information, the likelihood of objection to release by those to whom it relates, and the potential risk to those individuals if released, I consider release to be unreasonable. The information is therefore exempt.  <b>Section 38:</b> Section 18(2) of the BLA Act is an enactment in force which prohibits named persons from releasing information of the type found in the document. It is therefore exempt.