

## Notice of Decision and Reasons for Decision

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Applicant:	'A16'
Agency:	Greater Shepparton City Council
Decision Date:	15 August 2019
Exemption considered:	Section 33(1)
Citation:	'A16' and Greater Shepparton City Council ( <i>Freedom of Information</i> ) [2019] VICmr 78 (16 August 2019)

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FREEDOM OF INFORMATION – emails– non-executive agency officers – planning applications

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 additional information in the documents.

My reasons for decision follow.

**Joanne Kummrow**  
Public Access Deputy Commissioner  
15 August 2019

## Reasons for Decision

### Background to review

1. The Applicant made a request to the Agency for access to the following documents:
  - ...full unredacted copies of the attached documents.
2. Redacted copies of documents obtained by the Applicant via previous FOI requests were included with the Applicant's FOI request. The redacted material in the attached documents was previously deemed exempt or irrelevant material. The documents are emails between Agency staff relating to two planning applications dated between - [two specific dates].
3. Following consultation with the Agency, the Applicant clarified and removed the following information from the scope of the request:
  - (a) the name of the member of the public who is referred to in document 1; and
  - (b) direct telephone numbers and telephone number extensions of Agency officers.
4. In its decision, the Agency identified nine documents falling within the terms of the Applicant's request. It decided to grant access to six documents in part (Documents 3 to 8) (the **Documents**) and three documents in full.

### Review

5. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
6. I have examined copies of the six documents subject to review.
7. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
8. 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 1 August 2019 and correspondence to this Office;
  - (c) the views of the affected Agency officers provided to the Agency during the consultation process required by section 33(2B); and
  - (d) the Agency's submissions dated 27 June 2019 and 24 July 2019.
9. 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

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

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

11. 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'.
12. 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>
13. 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.
14. 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>3</sup>
15. The information subject to review is two Agency staff names, an email address and a position title.
16. The Agency submitted the following information in support of its view it is unreasonable to release the personal affairs information of the two Agency officers in this instance:
  - (a) it is unreasonable to disclose the names of staff holding non-executive positions;<sup>4</sup>
  - (b) the executive officers of the Agency are ultimately accountable for decisions of the Agency. In contrast, the officers whose personal affairs information was exempted in the documents are prohibited from publicly commenting on the documents in their personal capacity pursuant to the Agency's Media Policy;<sup>5</sup>
  - (c) in this case, the Agency consulted with third parties whose personal affairs information was exempted in the documents to obtain their views on disclosure. The parties have objected to the release of their information;
  - (d) the exempt material is not known or publicly available;
  - (e) in regards to documents 3, 5 and 8, it would be contrary to the public interest as disclosure of the personal affairs information would be likely to significantly hinder frankness and candour of future comments and advice provided by Council employees when using email.<sup>6</sup> Council employees may then tailor future advice and how they communicate knowing that they may face personal criticism; and
  - (f) the likelihood of further disclosure of the documents is high.

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

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

<sup>3</sup> *Victoria Police v Marke* [2008] VSCA 218 at [68].

<sup>4</sup> *Coulson v Department of Premier and Cabinet* [2018] VCAT 229; *Smeaton v Victorian WorkCover Authority* [2012] VCAT 1549; *Proctor v Mornington Peninsula Shire* [2018] VCAT 638.

<sup>5</sup> Greater Shepparton Council, *Media Policy*, see <[http://greatershepparton.com.au/assets/files/documents/our\\_council/council\\_documents/policies/Media\\_Policy.pdf](http://greatershepparton.com.au/assets/files/documents/our_council/council_documents/policies/Media_Policy.pdf)>.

<sup>6</sup> *Cowen v Monash University* [2018] VCAT 694.

17. In its submission, the Agency requested I consider the Applicant's motive for seeking access to person affairs information in accordance with the Victorian Civil and Administrative Tribunal's (VCAT) decision in *Proctor v Mornington Peninsula Shire* [2018] VCAT 638.
18. The Applicant provided the following information to support their application for review:
- (a) another planning application has been lodged to the Agency, which is due to be considered by the Agency [at a future date], for which the Applicant is [involved];
  - (b) the Applicant seeks to determine whether the same Agency officers involved in planning applications lodged in [year] are the same officers involved in a current planning application lodged in [year]. If so, the Applicant intends to lodge a complaint to the Agency prior to its consideration of [the] new application in an upcoming Meeting; and
  - (c) the Applicant is of the view the Agency officers, whose personal affairs information is redacted in the documents, are responsible for all planning recommendations that go to the Agency on planning matters.
19. This information is personal affairs information. Therefore, I must decide whether it would be unreasonable to release it.
20. 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.
21. I have decided it is not unreasonable to release this information, for the following reasons:
- (a) I generally agree that, consistent with the decision of the VCAT decision in *Coulson v Department of Premier and Cabinet (Coulson decision)*,<sup>7</sup> whether agency officer's personal affairs information is exempt under section 33(1) must be considered in the context of the particular circumstances of each matter.
  - (b) In the Coulson decision, the respondent's submission noted the fact the non-executive staff were not the decision makers in relation to the case. I accept in general terms that non-executive agency officers are unlikely to have 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 officers.
  - (c) However, while the seniority of agency officers is a relevant consideration, I am of the view that this consideration is not determinative. Subject to an agency demonstrating that special circumstances apply, it is not unreasonable to disclose the names and position titles of non-executive agency officers where they are merely carrying out their usual duties or responsibilities as public servants.
  - (d) This view is consistent with the Victorian Supreme Court of Appeal decision of *Victoria Police v Marke* [2008] VSCA 218 in which it was held there is 'no absolute bar to providing access to documents which relate to the personal affairs of others', the personal privacy exemption 'arises only in cases of unreasonable disclosure', and '[w]hat amounts to unreasonable disclosure of someone's personal affairs will necessarily vary from case to case.'<sup>8</sup>

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<sup>7</sup> [2018] VCAT 229.

<sup>8</sup> at [76].

- (e) The personal affairs information is not particularly sensitive, in fact, the staff members' personal affairs information is publicly available. For example, on the Agency's website and other media. Nor is the content and nature of the documents sensitive.
- (f) I note the Agency officers objected to the release of their personal affairs information in this instance. However, for the reasons set out above, I consider the right of access to information under the FOI Act outweighs the staff members' personal privacy in the particular circumstances of this matter.
- (g) I also note the Agency's view that disclosure of such information would likely affect the frankness and candour of Agency officers. However, as the Agency officers were engaged in their required duties, I do not accept it is likely such disclosure will have any material or lasting effect on the advice they are required to provide to the Agency in the future in accordance with their employment responsibilities and relevant public sector values in the *Code of Conduct for Victorian Public Sector Employees* issued by the Victorian Public Sector Commissioner under section 61 of the *Public Administration Act 2004* (Vic).<sup>9</sup>

22. Accordingly, I have determined the personal affairs information of the two Agency officers is not exempt under section 33(1).

#### ***Deletion of irrelevant information***

- 23. 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 irrelevant information and the applicant agrees to receiving such a copy.
- 24. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'<sup>10</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>11</sup>
- 25. 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 contains telephone numbers of persons other than the Applicant.
- 26. I have considered the effect of deleting irrelevant information from the documents. In my view, it is practicable for the Agency to delete the information, because it would not require substantial time and effort, and the edited documents would retain meaning.

#### ***Conclusion***

- 27. On the information available, I am satisfied section 33(1) does not apply to documents. I have determined to grant access to the documents in full, except for the deletion of irrelevant information in accordance with section 25.

#### ***Review rights***

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<sup>9</sup> See, for example, the public sector value of 'Responsiveness' which requires Victorian public sector employees to demonstrate responsiveness by 'providing frank, impartial and timely advice to the Government'.

<sup>10</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>11</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].

28. 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>12</sup>
29. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.<sup>13</sup>
30. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.<sup>14</sup>
31. 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.
32. 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>15</sup>

### **Other matters**

33. Section 49P(5) states that if I decide to disclose a document claimed to be exempt under section 33(1) I must, if practicable, notify any person who has a right to apply to VCAT for a review of my decision of their right to do so.
34. In considering the meaning of 'practicable' in relation to other sections of the FOI Act, VCAT has stated the following:

The use of the word 'practicable' in the legislation to my mind connotes a legislative intention to apply common sense principles. 'Practicable' is not a term of art or a term of precise meaning.

... The use of the word indicates there should be imported into the process the exercise of judgment by the agency concerned. It does not allow for the conclusion that because a task is possible, it must, ergo, be undertaken.<sup>16</sup>

35. VCAT also considers the possibility of an unnecessary intrusion into the lives of third parties is relevant when assessing the practicability of notifying them.<sup>17</sup>

### **When this decision takes effect**

36. I have decided to release documents that contain information relating to the personal affairs of third parties.
37. The relevant third parties will be notified of my decision and are entitled to apply to VCAT for a review within 60 days from the date they are given notice.
38. My decision does not take effect until the relevant review period (stated above) expires. If a review application is made to VCAT, my decision will be subject to any VCAT determination.

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<sup>12</sup> The Applicant in section 50(1)(b) and the Agency in section 50(3D).

<sup>13</sup> Section 52(5).

<sup>14</sup> Section 52(9).

<sup>15</sup> Sections 50(3F) and (3FA).

<sup>16</sup> *Re Schubert and Department of Premier and Cabinet* (2001) 19 VAR 35 at [45].

<sup>17</sup> *Coulston v Office of Public Prosecutions Victoria* [2010] VCAT 1234 at [42].