

Notice of Decision and Reasons for Decision

Applicant:	'A19'
Agency:	Yarra City Council
Decision Date:	19 August 2019
Exemptions considered:	Section 33(1)
Citation:	'A19' and Yarra City Council (<i>Freedom of Information</i>) [2019] VICmr 81 (19 August 2019)

FREEDOM OF INFORMATION – council documents – planning applications – personal affairs information of agency officers

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 to the Applicant.

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

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner
19 August 2019

Reasons for Decision

Background to review

1. This review concerns two planning applications that were subject of a decision made by the Agency's Internal Development Approvals Committee (**IDAC**).
2. The Applicant made a FOI request to the Agency for access to:

The notes of the Planning Officer – referred to as the Co-ordinator – who attended the meeting on [date] and the content of any emails or letters or notes of telephone conversations with the participants prior to that meeting and subsequent to it (arising from that meeting) and similarly notes of conversations and copies of emails to the Developer prior to and arising from that meeting.

Similarly in relation to the meeting of [date]– the notes of the Planning Officer – referred to as the Co-ordinator – who attended the meeting on [date] and the content of any emails or letters or notes of telephone conversations with the participants prior to that meeting and subsequent to it (arising from that meeting) and similarly notes of conversations and copies of emails to the Developer prior to and arising from that meeting.

3. In its decision, the Agency identified certain documents falling within the terms of the Applicant's request. It decided to grant access to the documents in part.

Review

4. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
5. By email on 25 and 26 April 2019, the Applicant advised OVIC they seek review of the Agency's decision to exempt the names of Agency officers in the documents only.
6. Accordingly, my review relates to the personal affairs information of Agency officers to which the Agency denied access and the personal affairs information of other third parties is not relevant to my review and will remain deleted in accordance with section 25.
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 dated 4 April 2019;
 - (b) information provided with the Applicant's review application, including an email sent by the Applicant to the Agency dated 23 March 2019 and the Applicant's submission to OVIC dated 25 April 2019;
 - (c) the Agency's response to enquiries made by OVIC staff dated 3 June 2019; and
 - (d) information publicly available on the Agency's website.
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 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

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.

Section 33(1)

12. 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;¹ and
 - (b) such disclosure would be 'unreasonable'.
13. 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.²
14. In deciding whether the exemption applies, it is necessary to determine whether disclosure of personal affairs information would be unreasonable in the circumstances.
15. 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.
16. 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.³
17. 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.⁴
18. I note the decision of *Victoria Police v Marke*,⁵ in which the Victorian Court of Appeal 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'. The Court further held, '[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'.⁶
19. I also note the decision of *Coulson v Department of Premier and Cabinet*⁷ (**Coulson decision**), in which the Victorian Civil and Administrative Tribunal (VCAT) held that whether or not an agency staff member's personal affairs information is exempt under section 33(1) must be considered in the context of the particular circumstances of each matter.
20. Therefore, 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'.⁸

¹ Sections 33(1) and (2).

² Section 33(9).

³ *AB v Department of Education and Early Childhood Development* [2011] VCAT 1263 at [58]; *Akers v Victoria Police* [2003] VCAT 397.

⁴ *Victoria Police v Marke* [2008] VSCA 218 at [68].

⁵ [2008] VSCA 218 at [76].

⁶ [2008] VSCA 218 at [79].

⁷ *(Review and Regulation)* [2018] VCAT 229.

⁸ [2008] VSCA 218 at [104].

21. In this case, I have considered the following factors⁹ 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 (for example, whether it is sensitive or its current relevance);
 - (b) the extent of which information is publicly available;
 - (c) the circumstances in which the information was obtained;
 - (d) whether any public interest would be promoted by disclosure;
 - (e) whether the individual to whom the information related consents or objects to the disclosure; and
 - (a) whether disclosure would, or would be reasonably likely to, endanger the life or physical safety of any person.¹⁰

Applicant's submission

22. The Applicant submitted the personal affairs information of the Agency officers should be released for the following reasons:
- (a) the Applicant is of the view the Council Planning Officer was the only point of contact for the developers;
 - (b) the Council Planning Officer liaised with the developer and their agents in order to make a recommendation to the IDAC;
 - (c) the recommendation was not unmediated by more senior Agency staff;
 - (d) the Applicant is of the view Council Planning Officers should be accountable for the advice they provide to developers; and
 - (e) the Applicant is of the view communications between the Council Planning Officer and developers and subsequent recommendations should be open for public scrutiny.

Do the documents contain personal affairs information?

23. I am satisfied the documents include personal affairs information comprising the names, email addresses and telephone numbers of Agency officers who hold the following positions:
- (a) [non-executive position title];
 - (b) [non-executive position title]; and
 - (c) [non-executive position title].
24. The Agency did not redact the above position titles from the documents.

⁹ A number of these factors were identified in *Page v Metropolitan Transit Authority* (1988) 2 VAR 243.

¹⁰ Section 33(2A).

Would disclosure of the personal affairs information be unreasonable?

25. Having reviewed the documents and on the information before me, I have decided it would not be unreasonable to disclose the personal affairs information of the Agency officers in the circumstances of this matter.
26. While I acknowledge planning applications can be sensitive in nature, the personal affairs information of the Agency officers in the documents subject to review is not particularly sensitive.
27. I also note that two of the names (being of the [non-executive position] and the [non-executive position]) of the agency staff the applicant is seeking are publicly available on the Agency's website. The third person's name subject to review appears only in relation to their position title.
28. I also note the [non-executive position] had a public facing role in the handling of the applications and directly liaised with the developer's agents and objectors.
29. The fact this information is publicly available weighs in favour of release of the personal affairs information of the [non-executive position] and [non-executive position].
30. The information under review was obtained and included in the documents in the course of the Agency officers' usual work duties and responsibilities in administering the Agency's planning functions under the law.
31. I accept the Agency officers were not the ultimate decision makers in relation to the planning applications. However, while the fact an agency officer is not the responsible decision maker may be relevant, it is not necessarily determinative.
32. In this matter, I do not place significant weight on the fact the Agency officers were not in decision making roles, but rather played a substantial role in the handling of the applications prior to their determination by the IDAC. This reflects their usual work duties and responsibilities as public sector employees in administering the Agency's planning functions under the law. As such, I consider the personal information in the documents concerns their professional roles rather than their personal or private lives.
33. I am satisfied release of personal affairs information in these documents would promote the public interest by ensuring accountability and transparency in advice provided and recommendations made by Agency officers in relation to the assessment of planning applications for decision by the IDAC.
34. Section 33(2B) requires that, in deciding whether disclosure would be unreasonable an agency must:
 - (a) notify the person who is the subject of that information (or, if deceased their next of kin), that the agency has received a request for access to the document; and
 - (b) seek that person's view as to whether disclosure of the document should occur.
35. However, compliance with the consultation requirements under section 33(2B) is not required in certain circumstances, including if the notification would be reasonably likely to cause the third party undue distress or is otherwise unreasonable or it is not practicable to do so in the circumstances.¹¹
36. There is no information before me that the Agency officers would be reasonably likely object to the release of their personal affairs information to the Applicant.

¹¹ Section 33(2C).

37. 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 its standard practice of redacting officers names from documents requested under FOI.
38. 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.
39. In these circumstances I do not consider the Agency officers would have reasonably objected to the release of their personal affairs information in the documents. In any case any objection to disclosure, while a relevant consideration, would not be wholly determinative of whether disclosure would be unreasonable in the circumstances.
40. There is no information before me to indicate disclosure of the personal affairs information is reasonably likely to endanger the life or physical safety of any person.¹²
41. Finally, while I note VCAT upheld the decision of the agency in the Coulson decision to exempt the personal affairs information of non-executive agency staff, I am not satisfied VCAT would intend its approach in this decision to be a 'blanket rule' that will apply in all circumstances.
42. Further, I consider the circumstances of the Coulson matter are different from the current matter. The respondent agency in the Coulson matter relied on several factors to argue the personal affairs information of non-executive agency officers should be exempt which, in my view, are not present in the current matter, namely:
- (a) The nature of the information: In Coulson decision, the underlying background to the matter and nature of the information in the documents was sensitive. Having reviewed the documents in this review, I do not accept this is the case in this matter.
 - (b) The circumstances in which the information was obtained (including circumstances of confidentiality): In the Coulson decision, the information was obtained in circumstances of confidentiality. Having reviewed the documents in this review, I do not accept this is the case in this matter.
 - (c) The likelihood of the information being information that the individuals concerned do not want to be disclosed: In the Coulson decision, there was evidence the agency officers objected to disclosure of their personal affairs information. As stated above, I have no information before me that the relevant Agency officers would reasonably object to disclosure of their personal affairs information in the documents.
 - (d) The identity and motive of the applicant: I consider the identify and motive of the applicant in the Coulson decisions differs to that in the current review.
 - (e) The purpose for which the Applicant seeks the document: The purpose for which the applicant in the Coulson decision differs to that in the current review.
 - (f) Whether there is a public or other important interest in disclosure of the information is a relevant consideration: Where VCAT was not satisfied there was a public or other important interest in disclosure of the personal affairs information in the Coulson decision, the current review is different as it involves transparency and accountability in the Agency's exercise of its statutory planning functions.

¹² Section 33(2A).

43. Upon consideration of the above factors, I am not satisfied disclosure of the personal affairs information of the three Agency officers in the documents would be unreasonable in the circumstances. Accordingly, I am not satisfied the personal affairs information in the documents is exempt under section 33(1).
44. However, any names of Agency staff who may have been copied into email correspondence and were not directly involved in the handling of the planning application are to remain exempt under section 33(1) as I am satisfied it would be unreasonable to release their personal affairs information in the circumstances, noting it is not directly relevant to the Applicant's request and purpose for seeking access to the information.

Deletion of exempt or irrelevant information

45. 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.
46. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'¹³ 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 25.¹⁴
47. I have considered the effect of deleting exempt and irrelevant information from the documents. 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.

Conclusion

48. On the information available, I am satisfied that the exemption in section 33(1) does not apply to the personal affairs information of Agency officers in the documents and this information should be released.
49. Also, as previously discussed, any personal affairs information relating to non-Agency staff is irrelevant to the review and is to remain deleted.
50. As it is practicable to edit the documents to delete irrelevant information, I have determined to grant access to the documents in part.

Other matters

51. 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.
52. 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.

¹³ *Mickelburgh 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].

¹⁴ *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].

.... 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.¹⁵

53. VCAT also considers the possibility of an unnecessary intrusion into the lives of third parties is relevant when assessing the practicability of notifying them.¹⁶
54. On balance, I am satisfied it is practicable to notify those individuals of their right of review.

Review rights

55. If either party to this review is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.¹⁷
56. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹⁸
57. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹⁹
58. Information about how to apply to VCAT is available online at www.vcat.vic.gov.au. Alternatively, VCAT may be contacted by email at admin@vcat.vic.gov.au or by telephone on 1300 018 228.
59. 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.²⁰

When this decision takes effect

60. I have decided to release documents that contain information relating to the personal affairs of third parties.
61. The relevant third party will be notified of my decision and is entitled to apply to VCAT for a review within 60 days from the date they are given notice.
62. For that reason, my decision does not take effect until that 60 day period expires. If a review application is made to VCAT, my decision will be subject to any VCAT determination.

¹⁵ *Re Schubert and Department of Premier and Cabinet* (2001) 19 VAR 35 at [45].

¹⁶ *Coulston v Office of Public Prosecutions Victoria* [2010] VCAT 1234 at [42].

¹⁷ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

¹⁸ Section 52(5).

¹⁹ Section 52(9).

²⁰ Sections 50(3F) and (3FA).

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
1.	[Date range]	Email correspondence, Letter dated [date] regarding [address in Victoria]	23	Released in part Section 33(1)	Release in part Section 25 The names, telephone numbers and email addresses of the [two non-executive Agency officers] is to be released, with exception to the Agency officer's name contained in the email dated [date] at [time]. The names of individuals who are not Agency officers are irrelevant to the Applicant's review and are to remain deleted in accordance with section 25.	Section 33(1): I am satisfied this document contains personal affairs information of Agency officers and non-Agency third parties, including their names, email and telephone numbers. I have decided it would not be unreasonable to release the personal affairs information of the [two non-executive Agency officers] in this document (including the name, email address and telephone number of [a non-executive Agency officer]) for the following reasons: (a) the nature of the document and the personal affairs information is not sensitive as it relates to the Agency officers in the conduct of their usual duties as a public servant; (b) the Agency officer's name and direct telephone number is available on the Agency's website in relation to the planning development application the subject of this document; (c) the Agency officer had direct contact with many parties/stakeholders involved in the planning application process, including the agents for the developer and objectors in the community; and (d) noting the Agency did not consult with its officers, there is no information before me to suggest the Agency officers object to the release of their personal affairs information. However, I consider it unreasonable to release the

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
						name of the Agency officer contained in the email dated [date] at [time] as it relates to the officer's health and does not relate to their professional duties.
2.	[Date range]	This is a redacted copy of Document 1	23	Released in part Section 33(1)	Not subject to review	
3.	[Date range]	Email Correspondence, two Memos from [a non-executive Agency officer], and letter dated [date], urban design referral, draft Consultative Meeting Report regarding [address in Victoria]	90	Released in part Section 33(1)	<p>Release in part Section 25</p> <p>The names, email addresses and phone numbers of the [three non-executive Agency officers] is to be released.</p> <p>The names of individuals who are not Agency officers are irrelevant to the Applicant's review and are to remain deleted in accordance with section 25. The remainder of the document is to be released.</p>	<p>Section 33(1): I am satisfied this document contains the personal affairs information of non-executive Agency officers, including their names and telephone numbers and a signature.</p> <p>I have decided it would not be unreasonable to release the personal affairs information of non-executive Agency officers in the memorandum on page 3 as one of the memorandum is already publicly available on the Agency's website. For this reason, I do not consider it would be unreasonable to release the personal affairs information of the Agency officer on pages 14 and 15.</p> <p>For the remainder of the personal affairs in the documents relating to [two non-executive Agency officers], I am satisfied it would not be unreasonable to release their personal affairs information for the reasons outlined in my comments for Document 1.</p>
4.	[Date range]	Email correspondence and	70	Released in part	Release in part	Section 33(1): See my comments for Document 1 regarding the personal affairs information of [a

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Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
		attachments regarding [address in Victoria], including continuation of draft Consultative Meeting report, clause 58 Assessment table, section 57A Application and Landscape report		Section 33(1)	<p>Section 25</p> <p>The name, email address and telephone number of the [non-executive Agency officer] is to be released.</p> <p>The names of individuals who are not Agency officers are irrelevant to the Applicant's review and is to remain deleted in accordance with section 25.</p> <p>The remainder of the documents is to be released</p>	non-executive Agency officer] in this Document.
5.	[Date range]	This is a redacted copy of Document 3	90	Released in part Section 33(1)	Not subject to review	
6.	[Date range]	This is a redacted copy of Document 4	70	Released in part Section 33(1)	Not subject to review	