

Notice of Decision and Reasons for Decision

Applicant:	'AK4'
Agency:	Monash University
Decision Date:	5 September 2019
Exemptions considered:	Sections 30(1), 33(1) and 35(1)(b)
Citation:	'AK4' and Monash University (<i>Freedom of Information</i>) [2019] VICmr 94 (5 September 2019)

FREEDOM OF INFORMATION – university grievance procedure – agency emails – working documents – documents affecting personal privacy – documents containing material obtained in confidence

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 the document in full.

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

My reasons for decision follow.

Sven Bluemmel
Information Commissioner

5 September 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. All documents dated between [date] and [date] to or from staff members of the University who were contacted in relation to the investigation of the grievance dated [date] made [by] the Applicant about unit [named subject] which was decided on [date].
 2. All documents dated between [date] and [date] to or from staff members of the University who were contacted in relation to the appeal by the Applicant to the University Student Ombudsman, [named person], made on [date] and decided on [date] about the outcome of the grievance of the Applicant about unit [named subject].
 3. All documents dated between [date] and [date] to or from academic board members about the investigation of a grievance dated [date] made [by] the Applicant about unit [named subject].
3. In its decision, the Agency identified 54 pages as falling within the scope of the Applicant's request. It provided 53 pages outside of the FOI Act and refused access to the one remaining page (**the document**) in full.

Review

4. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
5. The Applicant advised [they were] seeking access to the document to which access has been refused. Accordingly, this review relates to one document, which can be described as an email chain consisting of two emails sent internally by an Agency officer on [date]. The emails each have an attachment, the attachments are titled, '[Applicant] Grivance [sic] Letter.docx' and, '[Applicant] – grievance documentation.pdf.' The Agency has confirmed that the attachments were both released to the Applicant administratively, outside of the FOI Act.
6. I have examined a copy of the document subject to review, and the documents released to the Applicant by the Agency.
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 5 February 2019 and information provided with the Applicant's review application;
 - (c) the Agency's submission dated 11 February 2019; and
 - (d) communications between OVIC staff, the Applicant and the Agency through its legal representative.
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 following exemptions to refuse access to the document: sections 30(1), 33(1) and 35(1)(b). The Agency's decision letter sets out the reasons for its decision.

Section 30(1)

11. Section 30(1) has three requirements:

- (a) the document must disclose matter in the nature of opinion, advice or recommendation prepared by an officer or Minister, or consultation or deliberation that has taken place between officers, Ministers or an officer and a Minister; and
- (b) such matter must be made in the course of, or for the purpose of, the deliberative processes involved in the functions of an agency or Minister or of the government; and
- (c) disclosure of the matter would be contrary to the public interest.

12. The exemption does not apply to purely factual material in a document.¹

13. The term 'officer of an Agency' is defined in section 5(1). It includes a member of the agency, a member of the agency's staff, and any person employed by or for the agency, whether that person is one to whom the provisions of the Public Administration Act 2004 (Vic) apply or not.

14. Determining whether disclosure is contrary to public interest requires a process of weighing conflicting merits and demerits against each other.²

15. In deciding if release is contrary to the public interest, I must consider all relevant facts and circumstances remaining mindful that the object of the FOI Act is to facilitate and promote the disclosure of information.

16. In deciding whether disclosure of the matter would be contrary to the public interest, I have taken the following into consideration³:

- (a) the right of every person to gain access to documents under the FOI Act;
- (b) the degree of sensitivity of the issues involved;
- (c) the state of the policy development process at which the communication was made;
- (d) whether the disclosure would be likely to inhibit frankness and candour in the making of communications;
- (e) whether disclosure would lead to confusion or unnecessary debate having regard to the possibilities discussed;
- (f) whether the disclosure will give merely a part explanation rather than a complete explanation for the taking of a particular decision;

¹ Section 30(3).

² *Sinclair v Maryborough Mining Warden* [1975] HCA 17; (1975) 132 CLR 473 at 485, adopted in *Department of Premier and Cabinet v Hulls* [1999] VSCA 117 at [30].

³ *Hulls v Victorian Casino and Gambling Authority* (1998) 12 VAR 483.

- (g) the likelihood disclosure of the documents would inhibit the independence of officers or the making of proper and detailed research and submissions by them;
- (h) the likelihood disclosure would create mischief in one way or another such as a risk of mischievous interpretation; and
- (i) the significance of the document, for example whether it is or is not merely a draft document.

17. In its submission, the Agency provided the following information about the application of section 30(1) to the document:

- (a) In the present case, the document records the opinions, i.e. personal views of a University staff member and discloses consultation occurring between University staff members.
- (b) The opinions and consultation occurred in the course of or for the purpose of the deliberative process involved in the functions of the University in dealing with grievances made by students of the University.
- (c) The University submits that disclosure would be contrary to public interest for the following reasons:
 - i. disclosure would most likely result in a future inability of the University to obtain similar information of a similar quality and nature and from similar sources in future. University staff, in particular the grievance team, would not be likely to be as frank and candid in future communications if the documents were released under the FOI Act. This is supported by the opinion of the staff member in question in their response to the consultation that occurred under [section] 33(2B) and 35(1A) of the FOI Act;
 - ii. the sensitivity of the subject matter relating to the University's capacity to undertake investigations of student grievances;
 - iii. disclosure would be unreasonable where to do so would cause staff members stress or anxiety for the purpose of embarrassing, pressuring or otherwise harming staff with a likely adverse impact on service provision and personal health and safety arising as a result; and
 - iv. disclosing a document reflecting only part of the decision-making process would be likely to lead to confusion and ill-informed debate and would have adverse effects on the integrity or effectiveness of the decision making process.

18. Having considered the relevant exemption, I have determined that the document does meet the first and second limb of the exemption. I am satisfied that it contains information that constitutes consultation between Agency officers as part of the deliberative process of responding to the Applicant's university grievance.

19. However, having balanced the information set out above, I do not consider it would be contrary to the public interest to release the document for the following reasons;

- (a) While documents relating to the processing of a student grievance may be considered sensitive, in the circumstances of this case the exempt information is not substantive to the deliberation and consultation process. The exempt information can be categorised as general comments that are peripheral to robust discussions or considerations surrounding the Applicant's grievance.
- (b) I do not consider that the release of the information would be likely to cause confusion or lead to unnecessary debate, the information does not discuss the contents of the attachments and associated grievance. Aside from showing consultation between officers, it is relatively

innocuous.

- (c) Whilst the information was created prior to a final decision being made on the Applicant's grievance, I reiterate that the exempt information does not contain substantive, sensitive or confidential communications. It is administrative in nature.
- (d) I do not consider disclosure of the document would inhibit the frank exchange of views given the nature of the document and that the Agency staff in question are expected to form and express an opinion on student grievances as part of their professional employment with the Agency.
- (e) The public interest weighs in favour of disclosure of such information as it provides additional transparency surrounding the Agency's decision-making and shows that multiple staff are involved in its decision making processes.

20. Having considered the above factors, I am not satisfied that the release of the exempt information is contrary to public interest. Accordingly, I have determined that the document is not exempt under section 30(1).

Section 33(1)

21. 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;⁴ and
- (b) such disclosure would be 'unreasonable'.

22. 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.⁵

23. 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.

24. 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, having considered this factor, I do not consider it to be a relevant factor in the circumstances.

25. 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.⁶ 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

⁴ Sections 33(1) and (2).

⁵ Section 33(9).

⁶ Section 33(2B).

(c) it is not practicable to do so.⁷

26. The Agency advised it has consulted with the third parties under section 33(2B) of the Act, one officer provided a submission that they did not want their personal affairs information released whilst another did not respond to consultation.

27. In its submission, the Agency provided the following information to support its view it would be unreasonable to disclose the personal affairs information in the document:

- (a) It is unreasonable to disclose the names of staff holding non-executive positions.⁸
- (b) Disclosure is less likely to be unreasonable where the applicant's motives are commendable; disclosure is more likely to be unreasonable where the applicant's reason for seeking access is out of some particular personal crusade, or for the purpose of embarrassing or otherwise harming the third persons concerned.⁹
- (c) The absence of any public interest in disclosure of personal affairs information or where disclosure is not in the public interest.¹⁰
- (d) The existence in [section] 13 of the Charter of the right of a person not to have his or her privacy, family or home arbitrarily interfered with.
- (e) It is unreasonable to release the personal affairs information of persons who have said they did not want their names and personal information released.¹¹
- (f) Whether the applicant can obtain the information sought by other means, such as a court order.¹²

28. I have decided it would not be unreasonable to release this information, for the following reasons:

- (a) I generally agree that, consistent with the decision of the Victorian Civil and Administrative Tribunal (VCAT) in *Coulson v Department of Premier and Cabinet*¹³ (**Coulson decision**), whether the personal affairs information of agency staff is exempt under section 33(1) must be considered in the context of the particular circumstances of each matter.
- (b) In the circumstances of this case, the personal affairs information being the names and job titles of the Agency officers have been released to the Applicant administratively. Further, I note that the names, job titles and business email addresses of the Agency officers and other members of the university faculty are available to both the Applicant and the wider public via the Agency's directory function on its website.
- (c) The personal affairs information is not particularly sensitive.

⁷ Section 33(2C).

⁸ *Coulson v Department of Premier and Cabinet* [2018] VCAT 229 at [124]-[127]; *Proctor v Mornington Peninsula Shire Council* [2018] VCAT 638 at [102]-[103]; *Cowen v Monash University* [2018] VCAT 694; *Smeaton & Smeaton v Victoria WorkCover Authority* [2018] VCAT 914; *Smeaton v Department of Premier and Cabinet* [2018] VCAT 1672.

⁹ *Gunawan v Department of Education* (unreported, Victorian Civil and Administrative Tribunal, Member Davis, 15 December 1998) 18; *Proctor v Mornington Peninsula Shire Council* [2018] VCAT 638.

¹⁰ *Mildenhall v Department of Planning and Development* (unreported, Administrative Appeals Tribunal, Member Preuss, 16 August 1995) 6.

¹¹ *Shaw v Department of Justice and Regulation* [2018] VCAT 2038 at [21].

¹² *Glascott v Victoria Police* [2014] VCAT 615, [75]; *Glascott v VicRoads* [2018] VCAT 1472, [37]; *RFX v Department of Health and Human Services* [2019] VCAT 65.

¹³ *Ibid.*

- (d) Nor is the content or nature of the documents sensitive – they are emails from an Agency officer with attachments regarding the processing of the Applicant’s grievance. The emails appear innocuous and administrative in nature.
- (e) Even though one of the Agency staff members has advised they object to the release of their personal affairs information, the personal affairs information is already known to the Applicant as some information of this kind was released outside of the FOI Act whilst other information is publicly available. I note that VCAT has previously found that release may still be unreasonable notwithstanding that a person’s identity may already be known to the Applicant.¹⁴ However, I consider that the circumstances of this case differ significantly to those in which VCAT made this determination.
- (f) While I note the Agency’s submission in relation to section 13 of the *Charter of Human Rights and Responsibilities 2006* (Vic) (**Charter**), and in addition I note the obligation on public authorities to interpret provisions in Victorian legislation consistent with human rights in the Charter,¹⁵ I do not consider my decision to disclose personal affairs information of Agency staff contravenes section 13 of the Charter. Disclosure of the information in the documents subject to review is not of a nature that would provide for arbitrary interference with those individuals’ ‘privacy, family or home’ given the personal affairs information has arisen solely in the context of their professional employment.

29. Having considered the above factors, I am not satisfied that the release of the exempt information is unreasonable in these circumstances. Accordingly, I have determined that the document is not exempt under section 33(1).

Section 35(1)(b)

30. A document is exempt under section 35(1)(b) if two conditions are satisfied:

- (a) disclosure would divulge information or matter communicated in confidence by or on behalf of a person or a government to an agency or a Minister; and
- (b) disclosure would be contrary to the public interest as it would be reasonably likely to impair the ability of an agency or a Minister to obtain similar information in the future.

31. In its submission, the Agency provided the following information about the application of section 35(1)(b) to the information:

...following consultation under [section] 35(1A) of the FOI Act, we submit that there is a real and not fanciful or remote chance that disclosure of the documents would result in a future inability of the University to obtain similar information of a similar nature and from similar sources in the future. There is a real chance that people would be unwilling to communicate in confidence with their colleagues and supervisors during deliberative processes if they believed that their confidential communications could be released under the FOI Act.

32. Whilst I acknowledge that the exempt information may have been communicated in confidence from the perspective of the communicator, I am not satisfied that disclosure would be contrary to public interest by reason that disclosure would be reasonably likely to impair the ability of the Agency to obtain similar information in future.

33. I am of the view that the exempt information is administrative in nature and was communicated by the Agency officer in the course of performing their professional duties. I further note that the University’s Grievance Policies and Procedures are available on the Agency’s website and stipulate that staff

¹⁴ *AB v Department of Education and Early Childhood Development* [2011] VCAT 1263

¹⁵ Section 38 of the Charter

employed in particular roles must consider student grievances. Accordingly, I do not consider that the release of the exempt information would impact the student grievance process.

34. Having considered the above factors, I am not satisfied that the release of the exempt information is contrary to public interest. Accordingly, I have determined that the document is not exempt under section 35(1)(b).

Conclusion

35. On the information available, I am not satisfied the exemptions in sections 30(1), 33(1) and 35(1)(b) apply to the document. Accordingly, I have decided to grant access to the document in full.
36. The Schedule of Documents in **Annexure 1** contains a brief summary of my decision with respect to the document.

Review rights

37. If either party to this review is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.¹⁶
38. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹⁷
39. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹⁸
40. 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.
41. 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.¹⁹

When this decision takes effect

42. I have decided to release a document that contains the personal affairs information of third parties and information provided in confidence by a third party.
43. 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.
44. 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. .

¹⁶ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

¹⁷ Section 52(5).

¹⁸ Section 52(9).

¹⁹ Sections 50(3F) and (3FA).

Annexure 1

Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
1.	[Date]	<p>Email sent at [time] with attachment; [Applicant] – grievance documentation.pdf</p> <p>E-mail sent at [time] with attachment; [Applicant] Grivance [sic] Letter.docx</p>	1	<p>Refused in full</p> <p>Sections 30(1), 33(1) & 35(1)(b)</p>	Release in full	<p>Section 30(1): The document discloses matter in the nature of opinion, advice and recommendation prepared by an Agency officer and concerns the deliberative process of the Agency. However, I do not consider it would be contrary to public interest to release the document for the reasons set out in the reasons for decision.</p> <p>Section 33(1): The document contains the personal affairs information of two Agency officers. For the reasons set out in the reasons for decision, I do not consider that disclosure of the personal affairs information would be unreasonable in these circumstances.</p> <p>Section 35(1)(b): I acknowledge that the exempt information may have been communicated in confidence from the perspective of the communicator, however, I am not satisfied that disclosure would be contrary to public interest by reason that the disclosure would be reasonably likely to impair the ability of an Agency or a Minister to obtain similar information in future for the reasons set out in the decision.</p>