

Notice of Decision and Reasons for Decision

Applicant:	'AN3'
Agency:	Department of Justice and Community Safety
Decision Date:	26 September 2019
Exemption considered:	Section 33(1)
Citation:	'AN3' and Department of Justice and Community Safety (<i>Freedom of Information</i>) [2019] VICmr 120 (26 September 2019)

FREEDOM OF INFORMATION – names of chairperson and members of Sex Work Ministerial Advisory Committee – personal affairs information – unreasonable disclosure – information available in public domain

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 document to the Applicant.

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

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner
26 September 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 names of both the Chairperson and the members of the Sex Work Ministerial Advisory Committee between the years [date range].
2. In its decision, the Agency identified there were no discrete documents falling within the terms of the Applicant's request. It decided to produce a document containing the information sought by the ordinary use of a computer in accordance with section 19.
3. The Agency decided to refuse access to 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 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) the information provided with the Applicant's review application;
 - (c) the Agency's submission dated 12 July 2019; and
 - (d) information provided by the Agency in the course of the review.
7. 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

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

Section 33(1)

9. 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'.

¹ Sections 33(1) and (2).

10. 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 I am satisfied this information is the personal affairs information of individuals other than the Applicant.
11. 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.
12. I note the Victorian Supreme Court of Appeal decision of *Victoria Police v Marke*³ 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'.⁴
13. 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.⁵
14. Section 33(2A) requires also 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 consider whether the disclosure of the information would, or would be reasonably likely to, endanger the life or physical safety of any person. I do not have any information before me to suggest this factor poses an issue in this matter.

Consultation requirements under the FOI Act

15. 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 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
 - (c) it is not practicable to do so.⁷
16. The Agency advised it consulted with certain third parties, where practicable, as required under section 33(1). Although I note consultation occurred after the Agency's decision and during the review period, I accept it was not practicable for the Agency to consult with all third parties, in particular, former Committee members whose contact details would not be known due to the passage of time.

Sex Work Ministerial Advisory Committee

17. The information subject to review is the Sex Work Ministerial Advisory Committee (the **Committee**) member's names, year of membership and duration of membership.

² Section 33(9).

³ [2008] VSCA 218.

⁴ *Victoria Police v Marke* [2008] VSCA 218 at [76].

⁵ *Victoria Police v Marke* [2008] VSCA 218 at [68].

⁶ Section 33(2B).

⁷ Section 33(2C).

18. The *Sex Work Act 1994* (Vic) (**Sex Work Act**) provides for the Committee as a key consultative body on sex work issues with members appointed by the Governor in Council on the recommendation of the Minister. The members consist of 'representatives of non-government organisations; sex workers and licensees; health and legal professionals who work with sex workers; and other relevant stakeholders'.⁸
19. During the review, the Agency submitted the following information to support its revised view that publicly available names could be released as part of the review:
 - (a) report titled *Improving the Regulation of the Sex Industry and Supporting Sex Workers Who Want to Move On*, published in October 2007 which contains a list of the names of 13 Committee members; and
 - (b) the Public Accounts and Estimates Committee notice titled *2016-2017 Financial and Performance Outcomes Inquiry Hearings: Department of Justice and Regulation Response to Questions on Notice*, dated April 2018 which contains a list of the ten most recent Committee members.
20. The Agency submitted it would be unreasonable to release the personal affairs information of the remaining names and dates in the list given the names are not in the public domain, the nature of the industry and the inherent sensitivity surrounding naming those who may not be known as being associated with sex work.
21. In its submission, the Agency stated the Minister sought to include representatives of sex workers on the Committee and it was difficult to attract individuals due to their concerns about maintaining their privacy. The Agency stated it supported keeping the previous Committee members' names confidential to protect people who are potentially vulnerable in the industry.
22. I note the Agency provided OVIC with a copy of the document in a form that was proposed for release to the Applicant as a part of this review (**Proposal for Release**).

Is the exempt information personal affairs information?

23. I am satisfied the names of former Committee members listed in the document constitutes their personal affairs information for the purposes of section 33(1).

Would disclosure of the personal affairs information be unreasonable in the circumstances?

24. Having carefully reviewed the information in the document, I am satisfied it would not be unreasonable to release the personal affairs information of former Committee members, where this information is available in the public domain. Specifically, in the context of their Committee membership, where the names of previous Committee members are identified in a Commonwealth Parliament Hansard report, on their current employer's website or in a media release.
25. While I note a previous Committee member objected to the release of their personal affairs information, in this instance, I consider the right of access to information under the FOI Act outweighs this former Committee member's personal privacy in the circumstances. I am satisfied release of the personal affairs of this individual would not be unreasonable given their membership of the Committee was in the course of their normal duties and responsibilities as a police officer.

⁸ Victorian Government, *Inquiry into People Trafficking for Sex Work – Government Response*, Report No 312 (2011) at para 5.

26. However, I am satisfied it would be unreasonable to disclose the remaining personal affairs information the Agency submits is exempt in accordance with the Proposal for Release, for the following reasons:
- (a) The extent to which the information is available to the public: It appears the names of these former Committee members and their membership to the Committee is not publicly known or accessible from publicly available documents. This weighs against disclosure.
 - (b) The nature of the personal affairs information: The document contains personal affairs information of persons other than the Applicant, including third party names, member-status and the dates of their membership. Having considered the Agency's submission, I accept the nature of the personal affairs information is sensitive and the Agency seeks to protect those who are potentially vulnerable in the sex work industry. This weighs against disclosure.
 - (c) Whether any public interest would be promoted by the release of the information: The Applicant stated their interest in obtaining the information is for research purposes. Therefore, I consider the Applicant's interest is of a personal or private nature in the absence of any public interest factors that would be served through disclosure of the information. This weighs against disclosure.
 - (d) The circumstances in which the information was obtained: The Agency recorded information provided by the third parties as part of its function under the Sex Work Act. However, as stated above, the personal affairs information of some previous members is not in the public domain. This weighs against disclosure.
 - (e) Whether the individuals to whom the information relates object, or would be likely to object, to the release of the information: Given the circumstances in which the Agency obtained the information, the role of the Committee and the fact certain names of former members are not publicly available, I am satisfied the third parties would be reasonably likely to object to its release. This weighs against disclosure.
 - (f) The likelihood of further disclosure of the information, if released: I note the Applicant submitted they will not publish the personal affairs information as a part of their research. However, the nature of release under the FOI Act is unrestricted and unconditional. This means that once a document is disclosed to an applicant, they are free to do what they wish with the document. Given the sensitive nature of the personal affairs information and the fact the relevant third parties would be reasonably likely to object to its release, I consider that while the Applicant may not intend to publish the names of former members, access to the information could be used to contact those persons for research purposes. This weighs against disclosure.
27. Accordingly, I have determined to release additional personal affairs information to the Applicant and to exempt certain information under section 33(1) in accordance with the Proposal for Release.

Deletion of exempt or irrelevant information

28. 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.
29. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'⁹ and the effectiveness of the deletions. Where

⁹ *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].

deletions would render the document meaningless they are not 'practicable' and release of the document is not required under section 25.¹⁰

30. I have considered the effect of deleting exempt information from the documents. In my view, it is practicable to delete the exempt information, because it would not require substantial time and effort, and the edited documents would retain meaning.

Conclusion

31. On the information available, I have determined to release additional personal affairs information to the Applicant and to exempt certain information under section 33(1). Accordingly, I have decided to grant access to the document in part in accordance with the Proposal for Release.
32. The Schedule of Documents in **Annexure 1** sets out my decision with respect to information in the document that is exempt and should be released.

Review rights

33. If either party to this review is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.¹¹
34. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹²
35. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹³
36. 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.
37. 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.¹⁴

Other matters

38. As stated above, I have determined to release certain personal affairs information of persons other than the Applicant.
39. 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.
40. 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.

¹⁰ *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].

¹¹ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

¹² Section 52(5).

¹³ Section 52(9).

¹⁴ Sections 50(3F) and (3FA).

.... 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

41. 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
42. On balance, I am satisfied it is practicable to notify the individuals, that the Agency consulted with or attempted to consult with, of their right to seek review of my decision to disclose their personal affairs information.

When this decision takes effect

43. I have decided to release documents that contain information relating to the personal affairs of a third party.
44. 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.
45. 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.

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].

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision
1.	[Date]	Expired/Resigned/Retired Appointments – Sex Work Ministerial Advisory Committee	2	Refuse in full Section 33(1)	<p>Release in part Section 33(1)</p> <p>The document is to be released to the Applicant except for the following information:</p> <ul style="list-style-type: none"> • rows 7, 8, 9 and 12 under the first date category; • row 8 under the third date category; • row 3 under the tenth date category; and • all rows under the eleventh date category; and row 2 under the thirteenth date category.