

Notice of Decision and Reasons for Decision

Applicant:	'AP2'
Agency:	Department of Justice and Community Safety
Decision Date:	8 October 2019
Exemptions considered:	Sections 33(1), 38 of the <i>Freedom of Information Act 1982</i> (Vic) and section 21M of the <i>Evidence (Miscellaneous Provisions) Act 1958</i> (Vic)
Citation:	'AP2' and Department of Justice and Community Safety (<i>Freedom of Information</i>) [2019] VICmr 137 (8 October 2019)

FREEDOM OF INFORMATION – dispute resolution documents – Dispute Settlement Centre of Victoria – case notes – third party correspondence – documents affecting personal privacy – personal affairs information of agency officers – secrecy provision

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 fresh 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 while I am satisfied certain information in the documents is exempt under section 33(1), I have determined additional information can be released in part in accordance with section 25.

In relation to Document 2, I am satisfied the document is exempt in full under section 38.

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

8 October 2019

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency for access to their file held by the Dispute Settlement Centre of Victoria (**DSCV**).
2. In its decision dated 19 March 2019, the Agency identified certain documents falling within the terms of the Applicant's request. It decided to:
 - (a) release seven pages in full;
 - (b) release five pages in part; and
 - (c) release 23 pages outside of the FOI Act.
3. During the review, the Agency located additional documents relevant to the terms of the Applicant's request.

Review

4. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
5. Section 49M(1) permits an agency to make a fresh decision on an FOI request during a review.
6. On 8 July 2019, the Agency made a fresh decision within the required 28 days under section 49M(2).
7. In its fresh decision, the Agency decided to:
 - (a) release six pages in full;
 - (b) release six pages in part;
 - (c) refuse access to eight pages in full; and
 - (d) release an additional 42 pages outside the FOI Act.
8. The Applicant did not agree with the Agency's fresh decision and, as required by section 49MA(2), I proceeded with my review on the basis of the fresh decision.
9. I have examined copies of the documents subject to review.
10. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
11. I have considered all communications and submissions received from the parties, including:
 - (a) the Agency's fresh decision on the FOI request;
 - (b) the Applicant's submission dated 14 August 2019 and information provided by the Applicant during the review; and
 - (c) information provided by the Agency during the review.

12. 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

13. The Agency relied on the exemptions under sections 33(1), 35(1)(b) and 38 to refuse access to certain documents in part and in full. The Agency's decision letter sets out the reasons for its decision. However, for the reasons set out below, I have not considered section 35(1)(b) in this matter.

Section 33(1)

14. 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'.

Do the documents contain 'person affairs information'?

15. 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
16. I am satisfied certain information exempted by the Agency under section 33(1), which in this instance is the names and initials of non-executive Agency staff, and the names and an acronym corresponding to third parties, is personal affairs information for the purposes of section 33(1).
17. However, I am not satisfied the telephone and facsimile numbers in the documents are personal affairs information, as they are publicly available and are not the direct contact details of individual staff.

Would disclosure of the information constitute unreasonable disclosure?

18. Determining 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.
19. In determining whether the release of the personal affairs information is unreasonable, I consider the following matters are particularly relevant in this matter:
- (a) the nature of the personal affairs information (for example, whether it is sensitive or its current relevance);
 - (b) the circumstances in which the information was obtained;
 - (c) whether the individuals to whom the information relates consent or object to the disclosure.
 - (d) the likelihood of further disclosure of the information, if released; and
 - (e) whether any public interest would be promoted by the release of the information.

¹ Sections 33(1) and (2).

² Section 33(9).

20. I have also taken into consideration 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 disclosed to them as they choose.³
21. 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.
22. I generally agree that, consistent with the decision of the VCAT decision in *Coulson v Department of Premier and Cabinet (Coulson decision)*,⁴ whether an 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.
23. 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 staff are unlikely to have authority to act on behalf of an 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 staff.
24. However, while the seniority of staff is a relevant consideration, I am of the view 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 staff where they are merely carrying out their usual employment duties or responsibilities.
25. This view is consistent with the Victorian Supreme Court of Appeal decision of *Victoria Police v Marke*⁵ 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.'⁶
26. In this matter, most of the DSCV staff named in the documents had direct roles in handling the Applicant's dispute. This reflects their usual work duties, which are public facing, as public sector employees in administering the agency's functions. As such, the personal information in the documents concerns their professional roles rather than their personal or private lives.
27. I note there is no information before me regarding the views of DSCV staff as to the release of their personal affairs information. 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.
28. Accordingly, I have determined it would not be unreasonable to disclose the personal affairs information of DSCV staff directly involved in handling the Applicant's matter. Accordingly, I have determined such information is not exempt under section 33(1).
29. While it is likely the Applicant knows the identity of the other third parties contained in the documents, I consider it would be unreasonable to release their names in the context of this matter for the following reasons:

³ *Victoria Police v Marke* [2008] VCSCA 218 at [68].

⁴ [2018] VCAT 229.

⁵ [2008] VSCA 218.

⁶ [2008] VSCA 218 at [76].

- (a) While I accept the Applicant is likely to know the names of the parties involved, disclosure of their personal affairs information in documents under the FOI Act may still be unreasonable in the particular circumstances of a dispute.⁷
- (b) The personal affairs information is more sensitive, given the circumstances in which it was obtained, namely, by an agency in the course of responding to a dispute lodged by the Applicant. I have given particular weight to this factor in light of the confidential handling of disputes by the DSCV.
- (c) I have considered the Applicant expressed frustrations over the Agency's decision and the handling of [their] dispute by the DSCV. In the circumstances, I consider there is an increased likelihood of further dissemination of the information if disclosed to the Applicant under the FOI Act.
- (d) I can see no countervailing public interest in the disclosure of this information.

30. Accordingly, I am satisfied certain information in the documents is exempt under section 33(1).

31. The Schedule of Documents in **Annexure 1** outlines my decision in relation to section 33(1) to each document.

Section 38

32. A document is exempt under section 38 if:

- (a) there is an enactment in force;
- (b) that applies specifically to the kind of information contained in the documents; and
- (c) the enactment must prohibit persons, referred to in the enactment, from disclosing that specific kind of information (either absolutely or subject to exceptions or qualifications).

33. 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.

Application of the secrecy provision

34. The Agency applied section 38 in conjunction with section 21M of the *Evidence (Miscellaneous Provisions) Act 1958 (Vic) (Evidence Act)* to refuse access to Document 2 in full.

35. The document comprises emails and email chains forwarded to the DSCV from third parties involved in the dispute with the Applicant.

36. Section 21M of the Evidence Act provides:

21M Confidentiality

- (1) A person who is or has been-
 - (a) a mediator; or
 - (b) a member or employee of a dispute settlement centre; or

⁷ *AB v Department of Education and Early Childhood Development* [2011] VCAT 1263 at [58]; *Akers v Victoria Police* [2003] VCAT 397.

- (c) a person working with or for a dispute settlement centre (whether or not for fee or reward)-

shall not communicate to any other person or publish any information or document acquired by the person by reason of being such a mediator, member, employee or person unless the communication or publication-

- (d) is made with the consent of the person from whom the information or document was obtained; or
- (e) is made for the purposes of evaluation the operation and activities of dispute settlement centres and does not disclose the identity of any person without his or her consent; or
- (f) is made by a person who reasonably considers that it is necessary to disclose the information or document for the purpose of preventing or minimising injury or damage to any person or property.

Penalty: 20 penalty units

- 37. Section 21K of the Evidence Act defines a 'dispute settlement centre' to be an organisation declared by Order of the Governor in Council to be a dispute settlement centre.
- 38. For the purposes of the Evidence Act, I am satisfied the DSCV is a 'dispute settlement centre'.
- 39. I am satisfied Document 2 is exempt under section 38 on grounds:
 - (a) the Evidence Act is an enactment in force for the purposes of section 38;
 - (b) the information in the documents is information to which section 21M of the Evidence Act applies, being information acquired by reason of being employees of DSCV;
 - (c) employees of DSCV are prohibited from disclosing such information; and
 - (d) based on the information before me, I am satisfied subsections (d) to (f) of section 21M of the Evidence Act do not apply in this instance.
- 40. Accordingly, I am not required to consider the application of the exemptions under sections 33(1) and 35(1)(b) to Document 2.

Deletion of exempt or irrelevant information

- 41. 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.
- 42. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'⁸ 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 25.⁹
- 43. I have considered the effect of deleting exempt information from the documents. In my view, it is practicable to delete the exempt information in Document 1 because it would not require substantial

⁸ *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].

⁹ *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].

time and effort, and the edited documents would retain meaning. However, I have determined it would not be practicable to delete the exempt information in Document 2 as I am satisfied the document is exempt in full.

Conclusion

44. My decision on the Applicant's request differs from the Agency's decision.
45. In relation to Document 1, while I am satisfied certain information in the document is exempt under section 33(1), I have determined additional information can be released in part in accordance with section 25.
46. In relation to Document 2, I am satisfied the document is exempt in full under section 38.

Review rights

47. If either party to this review is not satisfied with my decision, they are entitled to apply to the Victorian Civil and Administrative Tribunal (**VCAT**) for it to be reviewed.¹⁰
48. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹¹
49. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹²
50. 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.
51. 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.¹³

Other matters

52. 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.
53. 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.¹⁴

54. VCAT also considers the possibility of an unnecessary intrusion into the lives of third parties is relevant when assessing the practicability of notifying them.¹⁵

¹⁰ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

¹¹ Section 52(5).

¹² Section 52(9).

¹³ Sections 50(3F) and (3FA).

¹⁴ *Re Schubert and Department of Premier and Cabinet* (2001) 19 VAR 35 at [45].

¹⁵ *Coulston v Office of Public Prosecutions Victoria* [2010] VCAT 1234 at [42].

55. On the balance, I am satisfied it is practicable to notify those individuals of their right to seek review of my decision to disclose their personal affairs information.

When this decision takes effect

56. I have decided to release documents that contain information relating to the personal affairs of third parties.
57. As stated above, the relevant third parties 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.

For that reason, my decision does not take effect until that 60 day review period expires. If a review application is made to VCAT, my decision will be subject to any VCAT determination.

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]	Case Notes Report	6	Released in part Section 33(1)	<p>Release in part Sections 33(1), 25</p> <p>This document is to be released to the Applicant except for the following information, which is exempt under section 33(1) and is to be deleted in accordance with section 25:</p> <p>(a) the names of third parties listed in the first line on page 1 next to the heading 'Case'; and</p> <p>(b) the initials of an agency officer in the final line in the file note dated [specified date] (word 6).</p>	<p>Section 33(1): The personal affairs information contained in this document are names, initials and acronyms of Agency staff and third parties.</p> <p>I am satisfied it is not unreasonable to release the personal affairs information of most of the Agency staff in this matter, for reasons outlined above in my notice of decision.</p> <p>However, I consider it unreasonable to release the initials of an Agency officer that had no involvement in this matter, other than being named in this document. Accordingly, their initials are exempt under section 33(1).</p> <p>I consider it unreasonable to release the names and other identifying information of other third parties for the reasons set out above.</p> <p>However, it is not unreasonable to release acronyms corresponding to third parties where it merely records information provided by the Applicant.</p> <p>Section 25: I am satisfied it is practicable to delete the exempt information, because it would not require substantial time and effort, and the edited documents would retain meaning.</p>

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
2.	[Date range]	Emails between DSCV and third parties	8	<p>Refused in full</p> <p>Sections 33(1), 35(1)(b) and 38</p>	<p>Refuse in full</p> <p>Section 38</p>	<p>Section 38: I am satisfied the document is exempt under section 38 in conjunction with section 21M of the Evidence Act for the reasons set out above.</p> <p>Section 25: I am satisfied it is practicable to delete the exempt information in the document as I am satisfied it is exempt in full under section 38.</p> <p>Sections 33(1) and 35(1)(b): Accordingly, I am not required to consider the application of the exemptions under sections 33(1) and 35(1)(b) to Document 2.</p>
3.	[Date range]	Emails between Consumer Affairs Victoria Enquiries and the DSCV regarding a referral	2	<p>Released in part</p> <p>Section 33(1)</p>	<p>Release in full</p>	<p>Section 33(1): I am not satisfied it would be unreasonable to disclose the personal affairs information of the Agency staff member. Accordingly, the document is not exempt under section 33(1) for the reasons set out above.</p>