

Notice of Decision and Reasons for Decision

Applicant:	'AK3'
Agency:	Monash University
Decision Date:	4 September 2019
Exemptions considered:	Sections 32(1) and 33(1)
Citation:	'AK3' and Monash University (<i>Freedom of Information</i>) [2019] VICmr 93 (4 September 2019)

FREEDOM OF INFORMATION – agency emails- documents affecting personal privacy – documents affecting legal proceedings

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

My reasons for decision follow.

Sven Bluemmel
Information Commissioner

4 September 2019

Reasons for Decision

Background to review

1. On 20 December 2018, the Applicant made a request to the Agency for access to the following documents:

I request all emails and records about myself and the processing of my requests to or from or copied to any of the following:

[Details of three named persons]

And any other person Monash University has access to their communications about me.

Time frame is [date] to date of acceptance.

2. On 16 January 2019, the Applicant made a further request to the Agency seeking access to-

All emails and documents sent to or from [named person] about:

1. [Named person] from [date] to [date]
2. [The Applicant] from [date] to [date]

Scope of initial request amended

3. The Agency interpreted the Applicant's request of 16 January 2019 as falling within the scope of [their] original request.
4. The Agency invited the Applicant to clarify the terms of the FOI request so that it could be considered valid under section 17.
5. Following correspondence with the Applicant, the scope of the request was amended to-

All emails and documents sent to or from [named person] about [the Applicant] from [date] to [date].
6. In its decision, the Agency identified ten documents falling within the terms of the Applicant's request. The Agency decided to refuse access to nine documents in full and one document was released outside of the FOI Act.
7. The Applicant did not indicate to the Agency, in their request and communication, that they sought access to edited copies.
8. During the review the Applicant made a concession on their request – advising this Office they would accept edited documents with exempt material deleted.
9. During the review, the Agency indicated that as the original application and decision dealt with unedited documents, there is an obligation under section 49P for the Information Commissioner to make a decision on the original application.
10. Section 49F provides that I 'may review the decision that is the subject of the application for review' while section 49P provides that I 'must make a fresh decision on the original application'. Neither section specifically prevents me from accepting the Applicant's concession for edited copies.
11. Further, in interpreting sections 49F and 49P, I have considered the objects and obligations in the FOI Act:

- a) Section 3(2) of the FOI Act states Parliament's intention that the Act shall be interpreted to promote the object of the FOI Act and 'facilitate and promote promptly and at the lowest reasonable cost, the disclosure of information.'
 - b) Section 3(1) makes clear the beneficial nature of the FOI Act and its object 'to extend as far as possible the right of the community to access to information'.
 - c) Section 6H(2) of the FOI Act requires me to perform my functions, including conducting reviews, with as little formality and technicality as possible.
 - d) Section 49H(1) requires me to conduct a review in a timely, efficient and fair manner, with as little formality and technicality as possible.
12. In my view, the process of merits review is made more timely and efficient when issues are narrowed by agreement with the party affected. Consequently, taking a purposive interpretation of sections 49F and 49P, I consider I have power to conduct a review and make a fresh decision on the basis that the Applicant concedes to receiving copies of edited documents with exempt information deleted.

Review

13. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
14. On 18 January 2019, the Applicant advised the Agency that they did not seek any emails sent directly to or from themselves to the Agency. Accordingly, emails sent to or from the Applicant are not relevant to my review and will be deleted in accordance with section 25.
15. I have examined copies of the documents subject to review.
16. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
17. I have considered all communications and submissions received from the parties, including:
- (a) the Agency's decision on the FOI request dated 19 February 2019;
 - (b) the Applicant's review application dated 19 February 2019;
 - (c) the Agency's submission dated 15 March 2019; and
 - (d) subsequent information provided by the Applicant and Agency to this Office.
18. 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

19. The Agency relied on the following exemptions in sections 32(1) and 33(1) to refuse access to the documents in full. The Agency's decision letter sets out the reasons for its decision.

Section 32(1)

20. Section 32(1) provides a document is an exempt document 'if it is of such a nature that it would be privileged from production in legal proceedings on the ground of legal professional privilege or client legal privilege'.
21. A document will be subject to legal professional privilege and exempt under section 32(1) where it contains a confidential communication:¹
- (a) between the client (or the client's agent) and the client's professional legal advisers, that was made for the dominant purpose of obtaining or providing legal advice or is referable to pending or contemplated litigation; or
 - (b) between the client's professional legal advisers and third parties, that was made for the dominant purpose of pending or contemplated litigation; or
 - (c) between the client (or the client's agent) and third parties that was made for the purpose of obtaining information to be submitted to the client's professional legal advisers for the dominant purpose of obtaining advice on pending or contemplated litigation.
22. The Agency advised that section 32(1) applied to Document 4 which contains communications between Agency officers and its in-house [redacted] legal advisor, for the dominant purpose of giving or obtaining legal advice. The Agency advised this document contains communications that are subject to legal privilege and is accordingly exempt under section 32(1).
23. On the information before me, there is no indication this document is a confidential communication provided in order to request or provide legal advice. Although the author of this email is a legal adviser, this email contains information that is administrative and not in the nature of legal advice.
24. Accordingly, I am not satisfied the document is exempt under section 32(1).
25. My decision with respect to the application of section 32(1) is set out in **Annexure 1**.

Section 33(1)

26. 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;² and
 - (b) such disclosure would be 'unreasonable'.
27. 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.³
28. 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.
29. The Agency advised it consulted with relevant Agency officers whose personal affairs information is contained in the documents. I have considered the views expressed by those parties in relation to each document in **Annexure 1** below.

¹ *Graze v Commissioner of State Revenue* [2013] VCAT 869 at [29]; *Elder v Worksafe Victoria* [2011] VCAT 1029 at [22]. See also *Evidence Act 2008* (Vic), section 119.

² Sections 33(1) and (2).

³ Section 33(9).

30. In its decision, the Agency provided the following information to support its view it would be unreasonable to disclose the personal affairs information in the documents:
- a) it is unreasonable to disclose the names of staff holding non-executive positions;⁴
 - 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 the purpose of embarrassing or otherwise harming the third parties concerned;⁵
 - c) the absence of any public interest in disclosure of personal affairs information or where disclosure is not in the public interest;⁶
 - 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; and
 - 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, as apparent by the outcome of the section 33(2B) consultations.
31. In its decision, the Agency advised that the documents contain personal affairs information of individuals including names, position titles, telephone numbers, mobile numbers, email addresses and other information that would enable a person's identity, address or location to reasonably be determined if the information is disclosed to the Applicant.
32. While I accept this information is personal affairs information, I must also determine whether it would be unreasonable to release it.
33. In summary, I have determined some of the personal affairs information in the documents can be released on grounds that:
- (a) many of the Agency officers hold relatively senior positions;
 - (b) in relation to non-executive staff, I generally agree that, consistent with the decision of the Victorian Civil and Administrative Tribunal (**VCAT**) in *Coulson v Department of Premier and Cabinet*⁷, (**Coulson**) whether agency officers personal affairs information is exempt under section 33(1) must be considered in the context of the particular circumstances of each matter;
 - (c) in the Coulson decision, the respondent's submission noted the fact that non-executive staff were not the decision makers in that matter. In relation to the documents subject to this review, the personal affairs information records Agency officers performing administrative functions on behalf of executive staff;
 - (d) the personal affairs information is not particularly sensitive;

⁴ *Coulson v Department of Premier & Cabinet* [2018] VCAT 229 at [124]-[127]; *Proctor v Mornington Peninsula Shire Council* [2018] VCAT 638 and [102]-[103]; *Cowen v Monash University* [2018] VCAT 694; *Smeaton & Smeaton v Victorian WorkCover Authority* [2018] VCAT 914.

⁵ *Gunawan v Department of Education* (unreported, Victorian Civil and Administrative Tribunal, Member Davis, 15 December 1998) 18; *Proctor v Mornington Peninsula Shire Council* [2018] VCA 638.

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

⁷ *Coulson v Department of Premier and Cabinet (Review and Regulation)* [2018] VCAT 229 (20 February 2018).

- (e) nor is the content or nature of the documents sensitive – they relate to and arise from correspondence regarding the FOI applications made by the Applicant to the Agency;
- (f) work contact details for Agency officers are either publicly available, or available to staff or students working at or attending the university;
- (g) I note the Agency officers were advised and provided reasons for their objection 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 Agency officers' personal privacy in the particular circumstances of this matter.
- (h) 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,⁸ I do not consider my decision to disclose personal affairs information of Agency officers contravenes section 13 of the Charter as disclosure of the information in the documents subject to review is not of a nature that would provide for an arbitrary interference with those individuals' 'privacy, family or home' given it arises solely in the context of their professional employment.

34. The Schedule of Documents in **Annexure 1** contains a brief summary of my decision with respect to each document exempted by the Agency under section 33(1).

Deletion of exempt or irrelevant information

- 35. 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.
- 36. 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 deletions would render the document meaningless they are not 'practicable' and release of the document is not required under section 25.¹⁰
- 37. I have considered the effect of deleting exempt information from the documents. In my view, it is practicable for the Agency to delete the exempt information, because the edited documents would retain meaning.

Conclusion

- 38. On the information available, I am satisfied the exemption in section 33(1) applies to six documents.
- 39. As previously discussed, the Applicant did not seek emails sent directly to or from the Agency to themselves. Accordingly, such information is irrelevant to my review and is to remain deleted.
- 40. As it is practicable to edit the documents to delete irrelevant information, I have determined to grant access to the documents in part.

⁸ Section 38 of the Charter.

⁹ *Mickelborough v Victoria Police (General)* [2009] VCAT 2786 [31]; *The Herald and Weekly Times Pty Limited v The Office of the Premier (General)* [2012] VCAT 967 [82].

¹⁰ *Honeywood v Department of Human Services* [2006] VCAT 2048 [26]; *RFJ v Victoria Police FOI Division (Review and Regulation)* [2013] VCAT 1267 [140], [155].

Other matters

41. 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.
42. 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.¹¹

43. VCAT also considers the possibility of an unnecessary intrusion into the lives of third parties is relevant when assessing the practicability of notifying them.¹²
44. On balance, I am satisfied it is practicable to notify those individuals of their right of review.

Review rights

45. If either party to this review is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.¹³
46. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹⁴
47. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹⁵
48. 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.
49. 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.¹⁶

When this decision takes effect

50. I have decided to release documents that contain information relating to the personal affairs of third parties.
51. 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.
52. 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.

¹¹ *Re Schubert and Department of Premier and Cabinet* (2001) 19 VAR 35 at [45].

¹² *Coulston v Office of Public Prosecutions Victoria* [2010] VCAT 1234 at [42].

¹³ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

¹⁴ Section 52(5).

¹⁵ Section 52(9).

¹⁶ 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]	Internal email chain (at [time])	5	Refused in full Section 33(1)	<p>Release in full with irrelevant material deleted</p> <p>Section 25</p> <p>This document is to be released with exception to the following emails, sent to and from the Applicant, which are to be deleted in accordance with section 25 as irrelevant:</p> <ul style="list-style-type: none"> • email [date and time]; • email [date and time]; • email [date and time]; and • email [date and time]. 	<p>Section 33(1): Document 1 comprises an email chain between Agency officers in response to emails sent by the Applicant.</p> <p>It contains the personal affairs information of-</p> <p>(a) the Applicant; and</p> <p>(b) the names, email addresses and telephone numbers of Agency officers.</p> <p>I have decided it would not be unreasonable to release this document for the following reasons:</p> <ul style="list-style-type: none"> • the Agency officers' names in the documents are those of senior staff; • other Agency officers whose names appears in the document have had direct communications with the Applicant, as such the nature of this information is not particularly sensitive or private given that it features in the context of them performing their employment duties rather than their personal or private lives and they are merely copied into the email; • one of the emails was sent on behalf of executive agency officers; and • whilst the Agency officers object to the release of their personal affairs information, for the reasons set

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						<p>our above, I do not consider it would be unreasonable to release this information in the circumstances.</p> <p>Accordingly, I am satisfied that the document is not exempt under section 33(1).</p> <p>Section 25: Emails sent directly to and from the Applicant are outside the scope of this review and are to be deleted as irrelevant</p>
2.	[Date]	Internal email chain [time]	5	Refused in full Section 33(1)	<p>Release in full with irrelevant material deleted</p> <p>Section 25</p> <p>This document is to be released with exception to the following emails sent to and from the Applicant, which are to be deleted in accordance with section 25 as irrelevant:</p> <ul style="list-style-type: none"> • email [date and time]; • email [date 	<p>Section 33(1): This document is similar to Document 1, consisting of an email chain between Agency officers and correspondence sent from the Applicant. I am not satisfied the disclosure of personal affairs information in the document would be unreasonable for the reasons outlined above for Document 1. Accordingly, I am not satisfied the document is exempt under section 33(1).</p> <p>Section 25: See comment above in Document 1.</p>

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
					<p>and time];</p> <ul style="list-style-type: none"> email [date and time]; and email [date and time]. 	
3.	[Date]	Internal email chain [time]	3	Refused in full Section 33(1)	<p>Release in full with irrelevant material deleted</p> <p>Section 25</p> <p>This document is to be released with exception to the following email, sent from the Applicant to the Agency, which is to be deleted in accordance with section 25 as irrelevant:</p> <ul style="list-style-type: none"> email [date and time]. 	<p>Section 33(1): This document includes an email from the Applicant and internal emails between senior Agency officers. It contains the personal affairs information of Agency officers.</p> <p>I am not satisfied the disclosure of personal affairs information in the document would be unreasonable for the reasons outlined above for Document 1. Accordingly, I am not satisfied the document is exempt under section 33(1).</p> <p>Section 25: See comment above in Document 1.</p>
4.	[Date]	Internal email chain [time]	2	Refused in full	Exempt in part	This document contains an email sent to the Agency from the Applicant on [date] at [time], and an email

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
				Sections 33(1), 32(1)	<p>Sections 33(1), 25</p> <p>The document is to be released in part with the exception of:</p> <ul style="list-style-type: none"> the mobile phone number of the Agency officer in the email dated [date] at [time], which is exempt under section 33(1) and is to be deleted; and the Applicant's email to the Agency dated [date] at [time] which is to be deleted as irrelevant under section 25. 	<p>chain between Agency officers in response to the Applicant's email.</p> <p>Section 32: Whilst the document is marked 'confidential and subject to legal professional privilege', there is no evidence before me that indicates the correspondence between the Agency officers was made for the dominant purpose of giving or obtaining legal advice, given the nature and context of the information. Accordingly, I am not satisfied the document is exempt under section 32(1).</p> <p>Section 33(1): I am not satisfied the disclosure of personal affairs information of Agency officers in the document would be unreasonable for the reasons outlined above for Document 1. However, I consider it unreasonable to release the mobile phone number of an Agency officer, in this instance, as it is not publicly available.</p> <p>Section 25: See comment above in Document 1.</p>
5.	[Date]	Internal email chain [time]	3	Refused in full Section 33(1)	<p>Release in part</p> <p>Sections 33(1), 25</p> <p>The document is to be released in part with the exception of:</p>	<p>Section 33(1): This document contains an email sent from a non-executive Agency officer to two generic agency business unit email addresses, which was then forwarded to a senior agency officer. The documents also includes an email chain between the Applicant and Agency officers.</p>

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
					<ul style="list-style-type: none"> the name and email address of the Agency officer who sent the email on [date] at [time] which his exempt under section 33(1); and information which is to be deleted from the document in accordance with section 25 as irrelevant: <ul style="list-style-type: none"> a) the email from the Applicant to the Agency dated [date] at [time]; b) email from the Applicant to the Agency dated [date] at [time]; and c) email from the Agency to the Applicant dated [date] at [time]. 	<p>This document contains the name and email address of an Agency officer.</p> <p>I have determined that it is unreasonable to release the name and email address of the non-executive Agency officer in this document for the following reasons:</p> <ul style="list-style-type: none"> the Agency officer does not hold a senior position within the Agency; their connection to the document is due to a purely administrative purpose as a result of an internal business process; the Agency officer objects to the release of their personal information; and there are no public interest factors supporting the release of the information. <p>Accordingly, I am satisfied that this document is exempt in part under section 33(1).</p> <p>Section 25: See comment above in Document 1.</p>

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Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
6.	[Date]	Internal email chain [time]	3	Refused in full Section 33(1)	<p>Release in part Sections 33(1), 25</p> <p>The document is to be released in part with the exception of:</p> <ul style="list-style-type: none"> the name and email address of the Agency officer who sent the email at [time] on [date] which is exempt under section 33(1) and is to be deleted; and the following information which is to be deleted in accordance with section 25 as irrelevant: <ul style="list-style-type: none"> a) the Applicant's email to the Agency dated [date] at [time]; b) the email sent to the Applicant from the Agency dated 	<p>Section 33(1): This document is similar to Document 5 and is exempt in part under section 33(1) for the reasons outlined above.</p> <p>Section 25: See comment above in Document 1.</p>

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
					[date] at [time].	
7.	[Date]	Internal email chain [time]	2	Refused in full Section 33(1)	<p>Release in part Sections 33(1), 25</p> <p>The document is to be released in part with the exception of:</p> <ul style="list-style-type: none"> the name and email address of the Agency officer who sent the email at [time] on [date] which is exempt under section 33(1) and is to be deleted; and the email sent from the Applicant to the Agency dated [date] at [time] which is to be deleted in accordance with section 25 as irrelevant. 	<p>Section 33(1): This document is similar to Documents 5 and 6 and is exempt in part under section 33(1) for the reasons outlined above.</p> <p>Section 25: See comment above in Document 1.</p>

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8.	[date]	Internal email chain [time]	4	Refused in full Section 33(1)	<p>Release in part Sections 33(1), 32</p> <p>The document is to be released in part with the exception of:</p> <ul style="list-style-type: none"> the name and email address of the Agency officer who sent the email at [time] on [date] which is exempt under section 33(1) and is to be deleted; and the email chain sent from the Applicant to the Agency which is to be deleted in accordance with section 25 as irrelevant including emails dated [date] at [time], including emails sent to and from third parties dated [date] at 	<p>Section 33(1): This document is similar to Documents 5, 6 and 7 and is exempt in part under section 33(1) for the reasons outlined above.</p> <p>Section 25: See comment above in Document 1.</p>

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
					[time]; [time], [time] and [time].	
9.	[Date]	Internal email chain [time]	2	Refused in full Section 33(1)	<p>Release in part Sections 33(1), 25</p> <p>The document is to be released in part with the exception of:</p> <ul style="list-style-type: none"> the name and email address of the Agency officer who sent the email at [time] on [date] which is exempt under section 33(1) and is to be deleted; and the following information which is to be deleted in accordance with section 25 as irrelevant: <p>a) the email sent from the Applicant to the Agency dated [date]</p>	<p>Section 33(1): This document is similar to Documents 5, 6, 7 and 8 and is exempt in part under section 33(1) for the reasons outlined above.</p> <p>Section 25: See comment above in Document 1.</p>

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Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
					at [time]; and b) the email sent from the Agency to the Applicant dated [date] at [time].	