

Notice of Decision and Reasons for Decision

Applicant:	'AQ8'
Agency:	Department of Education and Training
Decision date:	30 October 2019
Provision and exemption considered:	Sections 25A(5), 33(1)
Citation:	'AQ8' and Department of Education and Training (Freedom of Information) [2019] VICmr 152 (30 October 2019)

FREEDOM OF INFORMATION – personal affairs information – refusal to process request on grounds all documents would be exempt – school photographs, reports and journals – unreasonable disclosure

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 is the same as the Agency's decision.

I am satisfied the requirements of section 25A(5) are met and I have decided to refuse to grant access to documents in accordance with the Applicant's FOI request under section 25A(5).

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner
30 October 2019

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency for access to the following documents:

[Educational institution] - Yearly School Photos, Yearly School Reports and Yearly School Journal relating to ... children [name] [date of birth] and [name] [date of birth] between [date range].
2. The Agency relied on section 25A(5) to refuse to grant access to documents in accordance with the Applicant's FOI request.

Review

3. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
4. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
5. I have considered all communications and submissions received from the parties, including:
 - (a) the Agency's decision on the FOI request;
 - (b) information provided with the Applicant's review application;
 - (c) the Agency's submission dated 1 August 2019; and
 - (d) the Applicant's email correspondence sent on 30 July and 7 October 2019.
6. 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 section 25A(5) to refuse to grant access to documents

7. The Agency determined documents falling within the terms of the Applicant's request would be exempt from release under one or more exemptions under the FOI Act. Accordingly, the Agency refused to grant access to documents in accordance with section 25A(5).
8. The reasons for the Agency's decision are set out in its decision letter dated 17 July 2019.
9. Section 25A(5) provides an agency may refuse to grant access to documents in accordance with an FOI request without having identified any or all of the documents, if it is apparent from the nature of the request, the documents would be exempt under the FOI Act, and where removal of the exempt material would not facilitate release of the documents, or it is clear the Applicant does not seek an edited copy of the documents in accordance with section 25.
10. The power in section 25A(5) is carefully circumscribed. A decision maker must be satisfied of the following three elements, which operate to limit its application:
 - (a) First, the exempt nature of the documents must be objectively apparent from the face of the request. Namely, the terms of the request as described by the applicant. The 'nature' of a document refers to its inherent or essential quality or character.
 - (b) Second, it must be apparent all the documents in the request are exempt.

(c) Third, it must be apparent from:

- (i) the nature of the documents, as described in the request, that no obligation would arise under section 25 for the agency to grant access to an edited copy of a document; or
- (ii) the request or through consultation with the applicant that the person would not wish to have access to an edited copy of the document.¹

What is the essential character of the documents requested?

11. The essential quality or character of the documents as described in the Applicant's request are the secondary school photographs, reports and journals of two of the Applicant's children.

Would the documents requested, as described by the Applicant, be exempt?

12. In refusing access to the requested documents under section 25A(5), the Agency submitted any documents relevant to the request would be exempt under section 33(1).

Section 33(1) – Documents containing personal affairs information

13. 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'.

Would the documents contain personal affairs information?

14. Information relates to the 'personal affairs' of a person if it is reasonably capable of identifying them, or of disclosing their address or location.³
15. It has also been held information relates to an individual's personal affairs if it 'concerns or affects that person as an individual'.⁴
16. As the nature of disclosure under the FOI Act is unrestricted and unconditional, this is to be interpreted by the capacity of any member of the public to identify a third party.⁵
17. Based on the terms of the Applicant's request, I am satisfied the documents would contain the personal affairs information of persons other than the Applicant, namely the Applicant's children.
18. I note one of the Applicant's children is now an adult and one is a minor.

Would release of the personal affairs information be unreasonable?

19. The concept of 'unreasonable disclosure' involves determining whether the public interest in disclosure of official information is outweighed by the personal interest in privacy.

¹ *Knight v Corrections Victoria* [2010] VSC 338.

² Sections 33(1) and (2).

³ Section 33(9).

⁴ *Hanson v Department of Education & Training* [2007] VCAT 123 at [9].

⁵ *O'Sullivan v Department of Health and Community Services (No 2)* [1995] 9 VAR 1 at [14]; *Beauchamp v Department of Education* [2006] VCAT 1653 at [42].

20. I adopt the view expressed by the Supreme Court of Victoria Court of Appeal in *Victoria Police v Marke*,⁶ in which it was 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'.
21. As also stated in *Victoria Police v Marke*, '[t]he protection of privacy, which lies at the heart of section 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'.⁷
22. 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
23. In determining whether disclosure of the personal affairs information in the documents would be unreasonable in the circumstances, I have considered the following factors:

(a) The Applicant's interest in the information, and whether their purpose for seeking the information is likely to be achieved

The FOI Act provides a general right of access that can be exercised by any person, regardless of their motive or purpose for seeking access to a document. However, the reasons why an applicant seeks access to a document is a relevant consideration in determining whether disclosure would be unreasonable.⁹

In this case, from correspondence received by OVIC from the Applicant it appears they consider the request to be a 'standard request by a parent, which I would contend needed my consent to produce'. I accept the Applicant has a strong personal interest in obtaining access to the documents. However, the context of the request indicates the Applicant's relationship with the children is a complex one and is, or has been, subject to Court orders governing the Applicant's access to the children.

Given the Agency determined to refuse to grant access to the documents under section 25A(5) without having identified any or all of the documents to which the request relates, it is not possible to determine whether the Applicant's purpose for seeking the information is likely to be achieved in the absence of knowing whether the actual documents sought exist.

Based on the above considerations, I consider this factor neither weighs in favour or against disclosure.

(b) Court order governing the Applicant's access to the children

In its decision letter, the Agency states a final Order made by the Federal Magistrates' Court of Australia in [year] granted the children's [other parent] sole parental responsibility. At the time the Court order was made, both children were minors.

The Agency submits the Applicant was provided with multiple opportunities to provide evidence to demonstrate the Court order in question has been repealed or subject to future amendment or variation sanctioned by the Court. The Applicant did not provide any such evidence.

During this review, the Applicant was also provided an opportunity to supply evidence with respect to any current Court order in place or otherwise repealed, amended or varied.

⁶ [2008] VSCA 218 at [76].

⁷ [2008] VSCA 218 at [79].

⁸ [2008] VSCA 218 at [104].

⁹ *Victoria Police v Marke* [2008] VSCA 218 at [104].

In response, the Applicant emailed two photographs that show parts of a document entitled, 'Minutes of Orders as Proposed by the ICL'. The Applicant was invited to provide a complete copy of the document. The Applicant did not provide any further documentation. On the information before me, I am unable to be satisfied this document is evidence of a subsequent Court order that repeals, amends or varies the [year] [order] governing the Applicant's access to the children.

I consider this factor weighs strongly against disclosure.

(c) Whether the individuals to whom the information relates would be likely to object to the release of the information

As stated above, one of the Applicant's children is now an adult. As such, I am satisfied it would be unreasonable to release their personal affairs information without their consent. However, there is no information before me to indicate they consent to the release of their personal affairs information to the Applicant.

While I note the Agency did not consult with the Applicant's adult child, I accept what appears to be complex family circumstances is likely to mean consultation, in the circumstances, would not be practicable, and is therefore not required for the purposes of determining if disclosure would be unreasonable.

In relation to the Applicant's second child, I am satisfied it would be unreasonable to release their personal affairs information without the consent of the parent with legal custody of this child. However, there is no information before me to indicate that person consents to the release of the child's personal affairs information to the Applicant. For the same reasons discussed above, I am satisfied consultation, in these circumstances, is not practicable.

On balance, I consider this factor weighs against disclosure.

(d) Whether the disclosure of the information would, or would be reasonably likely to endanger the life or physical safety of any person

I have considered section 33(2A) in determining if release of the personal affairs information of third parties would be unreasonable in the circumstances. This provision requires that I consider whether disclosure of information in the documents would, or would be reasonably likely, to endanger the life or physical safety of any person.

On the information before me, there is no evidence to suggest this is a relevant factor in this matter.

24. Having weighed up the above factors, I am satisfied disclosure of the personal affairs information in any documents sought by the Applicant would be unreasonable and, therefore, the documents would be exempt under section 33(1).

Deletion of exempt or irrelevant information

25. Section 25 requires an agency to grant access to an edited copy of a document when it is practicable for the agency to delete exempt or irrelevant information and the applicant agrees to receiving such a copy.
26. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'¹⁰ 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 25.¹¹

¹⁰ *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].

¹¹ *Honeywood v Department of Human Services* [2006] VCAT 2048 [26]; *RFJ v Victoria Police FOI Division (Review and Regulation)* [2013] VCAT 1267 [140], [155].

27. Having considered the nature of the documents sought, in my view, it would not be practicable to provide the Applicant with an edited copy of the documents with exempt information deleted, as to do so would render the documents meaningless.

Conclusion

28. On the information available, I am satisfied disclosure of the personal affairs information in all documents sought by the Applicant would be unreasonable and, therefore, would be exempt under section 33(1). I am also satisfied it would not be practicable to provide the Applicant with an edited copy of any such documents in accordance with section 25.
29. Accordingly, I am satisfied the requirements of section 25A(5) are met and I have decided to refuse to grant access to documents in accordance with the Applicant's FOI request under section 25A(5).

Review rights

30. 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.¹²
31. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹³
32. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹⁴
33. 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.
34. 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.¹⁵

When this decision takes effect

35. 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.

¹² The Applicant in section 50(1)(b) and the Agency in section 50(3D).

¹³ Section 52(5).

¹⁴ Section 52(9).

¹⁵ Sections 50(3F) and (3FA).