

Notice of Decision and Reasons for Decision

Applicant:	'AR7'
Agency:	VicRoads
Decision date:	13 November 2019
Exemption considered:	Section 33(1)
Citation:	'AR7' and <i>VicRoads (Freedom of Information)</i> [2019] VICmr 161 (14 November 2019)

FREEDOM OF INFORMATION – file notes – medical review documents – Victorian Institute of Forensic Medicine communication – email – Helpdesk System information – name of an administrative officer – personal affairs information

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 I have decided to release further 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.

Joanne Kummrow
Public Access Deputy Commissioner

13 November 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 clarified the initial request.
2. The clarified request was for access to the following documents:

Information relating to the decision process followed which has allowed [the Applicant] to retain [their] heavy vehicle category [licence].
3. In its decision, the Agency identified 43 pages falling within the terms of the Applicant's request. It decided to grant access to 37 pages in full and six pages in part.

Review

4. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision.
5. The Applicant indicated they seek review of the Agency's decision to refuse access to parts of the documents.
6. Section 49M(1) permits an agency to make a fresh decision on an FOI request during a review.
7. On 8 August 2019, the Agency made a fresh decision under section 49M(1) as it located additional documents relevant to the Applicant's request.
8. In its fresh decision, the Agency identified 50 pages of material relevant to the Applicant's request. The Agency determined to grant access to 37 pages in full and 13 pages in part. However, upon commencement of this review the Agency identified 14 pages (rather than 13 pages) were exempt in part. The Agency made its fresh decision within the required 28 days under section 49M(2).
9. On 14 August 2019, the Applicant advised they 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.
10. My review concerns the 14 pages which the Agency granted access in part. I have identified each page subject to review using the document numbering convention adopted by the Agency.
11. I have examined copies of the documents subject to review.
12. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
13. 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 22 August 2019 and information provided with the Applicant's review application;
 - (c) the Agency's submission dated 18 September 2019; and
 - (d) communications between OVIC staff, the Applicant and the Agency.

14. 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

15. The Agency relies on the exemption in section 33(1) to refuse access to parts of the 14 documents. The Agency's fresh decision sets out the reasons for its decision.

Section 33(1)

16. 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'.
17. 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

Do the documents contain personal affairs information?

18. The information the Agency exempted under section 33(1) comprises:
- (a) the names of four Agency officers;
 - (b) the email address and telephone number of one Agency officer;
 - (c) telephone and fax numbers of the Agency; and
 - (d) the name and signature of one medical professional.
19. With the exception of the telephone and fax number for the business unit of the Agency in Documents 18 and 24, which is publicly available online, I am satisfied the other information exempted by the Agency constitutes personal affairs information. Therefore, I must determine whether it would be unreasonable to release this information in the circumstances.

Would disclosure of the personal affairs information be unreasonable?

20. The concept of 'unreasonable disclosure' involves balancing the public interest in the disclosure of official information with the personal interest in privacy in the circumstances.
21. Even where an applicant claims to know the identity of a third party, disclosure of their personal affairs information may still be unreasonable in the circumstances.³
22. 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.⁴

¹ Sections 33(1) and (2).

² Section 33(9).

³ *AB v Department of Education and Early Childhood Development* [2011] VCAT 1263 at [58]; *Akers v Victoria Police* [2003] VCAT 397.

⁴ *Victoria Police v Marke* [2008] VSCA 218 at [68].

23. In *Victoria Police v Marke*,⁵ the Victorian Supreme Court of Appeal 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'. The Court further held, '[t]he protection of privacy, which lies at the heart of s 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'.⁶
24. I also note *Coulson v Department of Premier and Cabinet*⁷ (**Coulson decision**), in which the Victorian Civil and Administrative Tribunal (**VCAT**) held that whether or not an agency staff member's personal affairs information is exempt under section 33(1) must be considered in the context of the particular circumstances of each matter.
25. Therefore, 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
26. In this case, I have considered the following factors⁹ when determining if disclosure of personal affairs information in the documents would be unreasonable in the circumstances:
- (a) the nature of the personal affairs information (for example, whether it is sensitive or its current relevance);
 - (b) the extent of which information is publicly available;
 - (c) the circumstances in which the information was obtained;
 - (d) whether any public interest would be promoted by disclosure;
 - (e) whether the individual to whom the information related consents or objects to the disclosure;
 - (f) the Applicant's dealings with the Agency, including any reasonable concerns arising from the Applicant's engagement with Agency officers and adverse impact of these interactions on Agency staff; and
 - (g) whether disclosure would, or would be reasonably likely to, endanger the life or physical safety of any person.¹⁰

Agency submission

27. In its decision and submission, the Agency provided the following reasons for deciding disclosure of certain personal affairs information in the documents would be unreasonable:
- (a) it is unreasonable to release the names and contact details of junior public servants;
 - (b) the information was provided in confidence;
 - (c) the information is personal information of a sensitive nature;
 - (d) there is no clear link between this information and the purpose of [the Applicant's] request;

⁵ [2008] VSCA 218 at [76].

⁶ [2008] VSCA 218 at [79].

⁷ *Review and Regulation* [2018] VCAT 229.

⁸ [2008] VSCA 218 at [104].

⁹ A number of these factors were identified in *Page v Metropolitan Transit Authority* (1988) 2 VAR 243.

¹⁰ Section 33(2A).

- (e) the Applicant has a history of being verbally aggressive when dealing with Agency staff;
 - (f) the individuals identified in the documents are administrative officers with their only involvement being completing their regular day to day tasks; and
 - (g) releasing their personal information may result in the Applicant contacting those individuals directly which would be undesirable.
28. The Agency advised it had consulted with third parties, whose personal affairs information appears in the documents, as required under section 33(2B) and provided copies of these responses for my consideration. I note some third parties objected to the release of their personal affairs information to the Applicant, while others did not respond to consultation.
29. Having reviewed the documents in their entirety, I consider the information is administrative in nature and was obtained and included in the documents in the course of the Agency officers' usual work duties and responsibilities in carrying out the Agency's licensing and medical review functions. As such, I consider the personal information in the documents concerns the Agency officer's professional roles rather than their personal or private lives.
30. I accept the Agency officers were not the ultimate decision makers in relation to the Applicant's licence. However, while the fact an agency officer is not the responsible decision maker may be relevant, it is not necessarily determinative. Where the Agency officer has a peripheral role in a matter, I am of the view disclosure of their name, direct office number, mobile number or direct email address, where the Applicant does not already know this information, is more likely to be unreasonable.
31. I have considered the Agency's position that release of personal affairs information in this matter could provide means for the Applicant to contact Agency staff directly, which is not standard Agency process. However, I note the documents show two of the four named Agency officers have previously communicated directly with the Applicant in the course of their professional duties, either via telephone or email.
32. While there is no specific information before me to indicate disclosure of the personal affairs information in question is reasonably likely to endanger the life or physical safety of any person,¹¹ on balance, I accept concerns raised by the Agency about the Applicant having previously been verbally abusive in dealings with the Agency.
33. In considering this factor, I note in *O'Sullivan v Police*¹² Morris J (VCAT President) held physical safety is not concerned solely with actual safety, but also with the perception of the relevant person as to whether he or she is safe. Similarly, in *Morse v Building Appeals Board (No 2)*¹³ VCAT found the maker of the documents in question may have a perception of fear if their personal information were disclosed.
34. Given the information before me indicating the Applicant has been verbally aggressive towards Agency staff in the past, I accept those staff may experience a perception of fear if their personal affairs information is disclosed.
35. I have also given consideration to the Applicant not providing any reason for seeking access to the personal affairs information of Agency staff such that any such reason could be balanced with the Agency's concerns.

¹¹ Section 33(2A).

¹² *O'Sullivan v Police (Vic)* (2005) 22 VAR 426; [2005] VCAT 532 at [19].

¹³ *Morse v Building Appeals Board (No 2)* [2007] VCAT 2344 at [15].

36. In balancing the above factors, I am satisfied it would be unreasonable to disclose the personal affairs information of Agency officers where the Applicant has not previously been provided with this information by the Agency.
37. Accordingly, such information is exempt under section 33(1). **Annexure 1** sets out my decision with respect to each document.
38. In relation to the release of a medical professional's name and signature in Document 24, I have considered the above factors and note there is no information before me that the Applicant has engaged negatively with this individual or their Agency. In the absence of such information and noting the document (and opinion of the medical professional contained therein) is over five years old, I do not consider it would be unreasonable to release the name of the medical professional.
39. However, I do consider it would be unreasonable to release the signature of the medical professional that appears within the document as I consider this information to be of greater sensitivity. Further, it does not appear that the individual in question was consulted regarding the release of their personal affairs information. Therefore, I have determined the individuals' personal privacy with regard to their signature outweighs the public interest in disclosure in this instance.

Deletion of exempt or irrelevant information

40. 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.
41. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'¹⁴ 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 25.¹⁵
42. I have considered the effect of deleting exempt information from the documents. In my view, it is practicable to delete the exempt information, as to do so would not require substantial time and effort and the documents would retain meaning.

Conclusion

43. On the information before me, I am not satisfied all personal affairs information exempted by the Agency is exempt under section 33(1). As I am satisfied it is practicable to edit the documents to delete exempt information, I have determined to grant access to the documents in part.
44. My decision on the application of section 33(1) to each document is set out in the Schedule of Documents at **Annexure 1**.

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.¹⁶
46. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹⁷

¹⁴ *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].

¹⁵ *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].

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

47. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹⁸
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.¹⁹

Other matters

50. 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.
51. 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.²⁰

52. VCAT also considers the possibility of an unnecessary intrusion into the lives of third parties is relevant when assessing the practicability of notifying them.²¹
53. On balance, I am satisfied it is practicable to notify those individuals of their right of review.

When this decision takes effect

54. I have decided to release documents that contain information relating to the personal affairs of third parties.
55. 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.
56. 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.

¹⁷ Section 52(5).

¹⁸ Section 52(9).

¹⁹ Sections 50(3F) and (3FA).

²⁰ *Re Schubert and Department of Premier and Cabinet* (2001) 19 VAR 35 at [45].

²¹ *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	OVIC Comments
2.	[Date]	File Notes	1	Released in part Section 33(1)	Release in part Sections 33(1), 25	<p>Section 33(1): On balance, I am satisfied it would be unreasonable to disclose the name of the Agency officer in this document in light of the factors discussed above. Accordingly, this information is exempt under section 33(1).</p> <p>Section 25: I am satisfied it is practicable to edit the document to delete exempt information in accordance with section 25.</p>
17.	[Date]	File Notes	1	Released in part Section 33(1)	Release in part Sections 33(1), 25	<p>Sections 33(1) and 25: See comments for Document 2 above.</p>
18.	[Date]	VIFM Report	1	Released in part Section 33(1)	<p>Release in part Section 33(1)</p> <p>This document is to be released with the phone and fax number for the Agency department released to the Applicant.</p>	<p>Section 33(1): As discussed in the Notice of Decision, I do not consider the telephone and fax number in this document constitutes personal affairs information. Accordingly, this information is not exempt under section 33(1).</p> <p>With respect to the names of the Agency officers that appear in the document, see comments for Document 2 above.</p> <p>Section 25: See comments for Document 2 above.</p>

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23.	[Date]	File Notes	1	Released in part Section 33(1)	Release in part Sections 33(1), 25	Sections 33(1) and 25: See comments for Document 2 above.
24.	[Date]	VIFM Report	1	Released in part Section 33(1)	Release in part Sections 33(1), 25 The phone and fax number for the Agency department and the name of the 'Recommending Doctor' are to be released to the Applicant; all other information should remain deleted as per section 33(1).	Section 33(1): See comments for Document 18 above. With respect to the name of the Agency officer that appears in the document, see comments for Document 2 above. However, I have determined it would not be unreasonable to disclose the name of the 'Recommending Doctor' in the document. Although, I am satisfied it would be unreasonable to disclose the signature of the medical professional as I accept it is of greater sensitivity. Accordingly, this information is exempt under section 33(1). Section 25: See comments for Document 2 above.
26.	[Date]	File Notes	1	Released in part Section 33(1)	Release in part Sections 33(1), 25	Sections 33(1) and 25: See comments for Document 2 above.
36.	[Date]	File Notes	1	Released in part Section 33(1)	Release in part Sections 33(1), 25	Sections 33(1) and 25: See comments for Document 2 above.

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39.	[Date]	File Notes	1	Released in part Section 33(1)	Release in part Sections 33(1), 25	Sections 33(1) and 25: See comments for Document 2 above.
40.	[Date]	File Notes	1	Released in part Section 33(1)	Release in part Sections 33(1), 25	Sections 33(1) and 25: See comments for Document 2 above.
41.	[Date]	File Notes	1	Released in part Section 33(1)	Release in part Sections 33(1), 25	Sections 33(1) and 25: See comments for Document 2 above.
42.	[Date]	File Notes	1	Released in part Section 33(1)	Release in part Sections 33(1), 25	Sections 33(1) and 25: See comments for Document 2 above.
43.	[Date]	E-mail	1	Released in part Section 33(1)	Release in full	Section 33(1): I am not satisfied it would be unreasonable to disclose the personal affairs information in this document which was sent directly from an Agency officer to the Applicant and contains information already disclosed to the Applicant. Accordingly, this information is not exempt under section 33(1).
44.	[Date]	Screen Print from VicRoads' Helpdesk System	1	Released in part Section 33(1)	Release in part Sections 33(1), 25	Sections 33(1) and 25: See comments for Document 2 above.

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45.	[Date]	File Notes	1	Released in part Section 33(1)	Release in part Sections 33(1), 25	Sections 33(1) and 25: See comments for Document 2 above.