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Notice of Decision and Reasons for Decision

Applicant:	'AR8'
Agency:	Department of Health and Human Services
Decision date:	14 November 2019
Exemptions considered:	Sections 31(1)(a), 33(1) and 35(1)(b)
Citation:	'AR8' and Department of Health and Human Services (<i>Freedom of Information</i>) [2019] VICmr 162 (14 November 2019)

FREEDOM OF INFORMATION – third party information – meeting minutes – *Disability Act 2006 (Vic)* – *Charter of Human Rights and Responsibilities Act 2006 (Vic)*

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 in that I have decided to refuse access to the document which is the subject of this review.

My reasons for decision follow.

Joanne Kummrow

Public Access Deputy Commissioner

14 November 2019

Reasons for Decision

Background to review

1. The Applicant, represented by their [parent] (the **representative**), requested access to information from the Agency, which at the time of the request managed the Shared Supported Accommodation (**SSA**) in which the Applicant resided:

DOCUMENT 1: Email sent by [Agency officer] about [date] to [another Agency officer], advising [Applicant] request to be provided with the means of accessing the [redacted] property at [SSA residential address].

DOCUMENT 2: Minutes of all Resident Meetings held in [year] and [year] for the SSA property at [residential address].
2. In its decision, the Agency identified eight pages falling within the terms of the Applicant's request.
3. The Agency decided to release one document in part and to refuse access to the second document in full relying on the exemptions under sections 31(1)(a), 33(1) and 35(1)(b). The Agency's decision letter sets out the reasons for its decision.

Review

4. The Applicant, through their representative, sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access in full to the second document (**Document 2**) only, comprising seven pages recording minutes of SSA resident meetings.
5. The Applicant advised they were satisfied with the information provided by the Agency in relation to Document 1. Accordingly, my review relates to Document 2 only.
6. In undertaking this 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.
7. I have been briefed by OVIC staff who inspected Document 2, which the Agency exempted under sections 31(1)(a)¹, 33(1) and 35(1)(b).
8. I understand Document 2 contains handwritten minutes of SSA resident meetings held during the period subject to the request. The minutes followed a standard pro forma and documented information such as the meeting location, date, duration, attendees, items discussed, any decisions made, and future actions or discussion items identified.
9. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
10. I have considered all communications and submissions received from the parties, including:
 - (a) the Agency's decision on the FOI request;
 - (b) the Applicant's submission dated 28 April 2019 and information provided with the Applicant's review application;
 - (c) the Agency's submission dated 20 May 2019; and
 - (d) correspondence received from the Agency during the review.

¹ Section 63D provides such documents may only be inspected at an agency's premises and the Information Commissioner is not entitled to take possession of them.

11. The Applicant, through their representative, provided the following contextual information regarding the meetings subject to Document 2 and their rationale for seeking access to this information:

I live in a Shared Supported Accommodation (SSA) due to a physical disability. This is not a Group Home under the Disability Act. Personal support services are provided to me and [several] other residents by DHHS.

[Additional contextual information redacted]

As a resident I have the right to attend and vote at these meetings, so nothing in records of the meetings should relate to information that I have not previously heard or seen during the meetings that I attended. Similarly, I should be able to inform myself of meetings I may not have attended - which is a traditional purpose of minutes.

[Redacted]

12. The Applicant highlighted the primary reason for seeking access to Document 2 was:

Because I do not receive written notification of these meetings I have no way of knowing whether I have been invited to all such meetings. Copies of minutes will enable me to see if I have missed a meeting I did not know about.

I have lately been told about decisions apparently made at these meetings which affect me personally which I do not recall being discussed. Minutes will help me to refresh my memory.

13. In addition to the rationale provided in its decision letter, the Agency provided the following information about its role managing the SSA, including facilitating resident meetings, in support of its application of exemptions to refuse access to Document 2:

The department is required to comply with a number of statutory obligations either specifically related to people with a disability or as part of its broader legislative responsibilities. Most importantly in the context of this request, the *Disability Act 2006* (Disability Act) requires the department to promote and protect the rights of persons accessing disability services and ensure those services are provided in a manner that respects the privacy and dignity of persons accessing the disability service.

The Principle is also enshrined in the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (The Charter) which requires public authorities to always give consideration to the human right of privacy, including the right to autonomy.

Resident meetings are an effective way to ensure disability clients in shared accommodation have the opportunity to exercise their right to be involved in making decisions about the way their home functions.

The information contained in [Document 2] is sensitive, in that the matters discussed at resident meetings are of great importance to the residents who often have few opportunities to make independent decisions about their lives. Although parts of the document appear to record day-to-day decisions, Part 4 of the Residential Services Practice manual (<https://providers.dhhs.vic.gov.au/residential-services-practice-manual>) highlights that for residents with limited capacity who are unable to have control over major life areas, choices about daily activities such as which activities they wish to participate in become very important.

[In the Agency's view] Residents expect that the information they discuss at meetings will not be disclosed to people who were not in attendance at the meeting without their expressed permission.

The department has a responsibility to protect the rights of other residents, especially in circumstances where they may not have the capacity to defend those rights themselves.

If the contents of confidential discussions at resident meetings between residents and staff were to become known to people who were not present at the meeting, the department would no longer be able to provide a safe and supportive environment for residents to freely participate in discussions and express their views...Release of the document under FOI, without any restrictions imposed, would pose an unacceptable risk to the rights of other residents. [Further], the department submits that disclosure

of the resident meeting minutes would prejudice the department's ability to promote and protect the residents' rights to privacy and autonomy as required by the Disability Act and the Charter.

The minutes recording these meetings are held in a central location. Residents can view the minutes but are not provided with a copy, ensuring the contents of the meetings cannot be shared with third parties.

Review of exemptions

14. The Agency relied on the exemptions under section 31(1)(a), 33(1) and 35(1)(b) to refuse access to Document 2 in full.
15. In determining whether information in Document 2 can be disclosed to the Applicant, I have considered each of the exemptions as follows.

Section 31(1)(a)

16. Section 31(1)(a) provides:

31 Law enforcement documents

- (1) Subject to this section, a document is an exempt document if its disclosure under this Act would, or would be reasonably likely to —
 - (a) prejudice the investigation of a breach or possible breach of the law or prejudice the enforcement or proper administration of the law in a particular instance;

17. 'Reasonably likely' means there is a real chance of an event occurring; it is not fanciful or remote.² 'Prejudice' means to hinder, impair or undermine and includes actual prejudice as well as impending prejudice.³
18. 'In a particular instance' does not require a single specific investigation. This phrase can encompass specific, identified aspects of law, administration of law or investigations of breaches or potential breaches of law.⁴
19. The Agency submits the second limb of section 31(1)(a) applies to Document 2, being that disclosure would, or would be reasonably likely to prejudice the enforcement or proper administration of the law in relation to the *Disability Act 2006* (Vic) (**Disability Act**) and the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (**Charter**).
20. I acknowledge the Applicant questioned the application of the exemption under section 31(1) by highlighting they were not aware of any specific provisions in the Disability Act referring to holding resident meetings. I have also considered their view:

I do not see that this exemption is valid as:-

- 1) The resident meetings should only address essentially domestic matters not specifically addressed in the DA [Disability Act]
- 2) If the minutes correctly reflect the meetings I would have participated in (or have been entitled to attend) I should already be privy to these discussions and decisions, so confirming minutes cannot possibly affect [the Agency] administering the DA.

² *Bergman v Department of Justice Freedom of Information Officer* [2012] VCAT 363 at [65], quoting *Binnie v Department of Agriculture and Rural Affairs* [1989] VR 836.

³ *Ibid*, *Bergman* at [66], referring to *Sobh v Police Force of Victoria* [1994] VicRp 2; [1994] 1 VR 41 (Nathan J) at [55].

⁴ *Cichello v Department of Justice (Review and Regulation)* [2014] VCAT 340 at [24].

21. While the Disability Act does not include specific provisions about the process for holding and recording outcomes of resident meetings, I consider the Agency's function at the time of facilitating these meetings as key to its role in protecting the residents' rights to privacy and autonomy as required by both the Disability Act and the Charter.

22. In particular, I note the objectives of the Disability Act in section 4 of that Act:

Objectives of Act

The objectives of this Act are to—

- (a) advance the inclusion and participation in the community of persons with a disability;
- (b) promote a strategic whole of government approach in supporting the needs and aspirations of persons with a disability;
- (c) facilitate the planning, funding and provision of services, programs and initiatives for persons with a disability;
- (d) promote and protect the rights of persons accessing disability services;
- (e) support the provision of high quality disability services;
- (f) make disability service providers accountable to persons accessing those disability services;
- (g) ensure the efficient and effective use of public funds in the provision of disability services.

...

23. It is clear from these objectives the Disability Act promotes the delivery of high quality services which are inclusive, supportive and, importantly, protect the rights of persons accessing disability services.

24. I appreciate the Applicant's view they would already be privy to the content of the meeting minutes if Document 2 accurately reflected discussions held at those meetings. However, I am of the view the unrestricted release of Document 2, which as detailed above contains both sensitive personal affairs information and information provided in confidence by third parties, has the potential to reasonably impair and undermine the Agency's ability to properly administer the Disability Act.

25. Accordingly, I am satisfied Document 2 is exempt under section 31(1)(a).

Section 33(1) – Document containing personal affairs information

26. A document is exempt under section 33(1) if two conditions are satisfied:

- (a) disclosure of a document under the FOI Act would 'involve' the disclosure of information relating to the 'personal affairs' of a person other than the Applicant;⁵ and
- (b) such disclosure would be 'unreasonable'.

Does Document 2 contain the 'personal affairs information' of individuals other than the Applicant?

27. Information will relate to the 'personal affairs' of a person if it is reasonably capable of identifying them, or of disclosing their address or location.⁶

28. It has also been held information relates to an individual's personal affairs if it 'concerns or affects that person as an individual'.⁷

29. A document will disclose personal affairs information if it is capable, either directly or indirectly, of identifying a particular individual whose personal affairs are disclosed. Further, as the nature of

⁵ Sections 33(1) and (2).

⁶ Section 33(9).

⁷ *Hanson v Department of Education and Training* [2007] VCAT 123 at [9].

disclosure under the FOI Act is unrestricted and unconditional, this is to be interpreted by the capacity of any member of the public to potentially identify a third party.⁸

30. As detailed above, Document 2 comprises minutes for SSA resident meetings held in the time period requested. It contains the names, addresses, locations and other personal affairs information about the SAA residents, Agency staff and other third parties. The document further contains the personal views and opinions of residents. I therefore must consider whether disclosure of such information is unreasonable.

Would disclosure of the personal affairs information be unreasonable?

31. The concept of 'unreasonable disclosure' involves determining whether the public interest in disclosure of official information is outweighed by the personal interest in privacy in the circumstances of a particular matter.
32. I adopt the view expressed by the Victorian Court of Appeal in *Victoria Police v Marke*,⁹ 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'.
33. 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'.¹⁰
34. I acknowledge the Applicant, as an attendee at the meetings, would know third parties named in Document 2 and would have been privy to the private matters discussed at the meetings. However, even where an applicant knows the identity of a third party, disclosure of their personal affairs information may still be unreasonable in the circumstances.¹¹
35. In this specific matter, I consider the following factors are particularly relevant in considering whether disclosure of the personal affairs information in Document 2 would be unreasonable:

- (a) The nature of the personal affairs information and the circumstances in which the information was obtained

Document 2 contains personal affairs information of persons other than the Applicant, including other residents and Agency staff. The nature of the personal affairs information is names, addresses and other identifying information, as well as more sensitive information such as their views and personal experiences in relation to their place of residence.

I accept the Agency's position the personal affairs information in Document 2 is sensitive and was obtained by the Agency in the context of exercising its disability housing functions under the Disability Act. This factor weighs against disclosure.

Residents: I consider the personal affairs information of residents in Document 2 concerns their private lives in a residential setting and is, by its very nature, personal and sensitive, particularly in light of the residents having a disability and the scope for ongoing involvement with the disability services sector. Therefore, I am satisfied disclosure of the personal affairs information relating to the residents would be unreasonable in the circumstances.

⁸ *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].

⁹ [2008] VSCA 218 at [76].

¹⁰ [2008] VSCA 218 at [79].

¹¹ *AB v Department of Education and Early Childhood Development* [2011] VCAT 1263 at [58]; *Akers v Victoria Police* [2003] VCAT 397.

Agency staff: I generally agree, consistent with the Victorian Civil and Administrative Tribunal (VCAT) decision, *Coulson v Department of Premier and Cabinet (Coulson decision)*,¹² whether an agency officer's personal affairs information is exempt under section 33(1) must be considered in the context of the circumstances of each particular matter.

In the Coulson decision, VCAT accepted non-executive agency staff should not be subject to the same level of public scrutiny as more senior agency staff. While I accept the seniority of staff may be a relevant consideration, I am of the view this consideration is not determinative. Subject to an agency demonstrating special circumstances apply, it will not be unreasonable to disclose the names and position titles of non-executive staff where they are merely carrying out their usual employment duties or responsibilities.

In this case, I am of the view Agency staff named in Document 2 were carrying out their usual duties or responsibilities in chairing or attending the meetings to support residents. While I note Agency staff, who were consulted on their views in accordance with section 33(2B), objected to release of their personal affairs information, I am satisfied disclosure of their names where they are referred to in Agency documents in the context of their employment duties is not unreasonable in these circumstances.

(b) The extent to which the information is available to the public

The information in Document 2 is not publicly available. As stated above, the information is held in a central location and is available for inspection by residents who attend the meetings, upon request. In the circumstances, I accept the Agency's rationale for maintaining the document centrally and not distributing it to residents is an attempt to protect the privacy of residents who are disability clients and to avoid unintended release to third parties.

(c) 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.

As detailed above, a key reason for the Applicant seeking access to the documents is to ensure they attended all residential meetings held during the period of interest and to review issues discussed and any decisions made at meetings to refresh their memory.

I acknowledge the Applicant's personal interest in obtaining access to Document 2, and the public interest in ensuring Agency officers lawfully carry out their duties under the Disability Act with necessary delegation or authority. This factor weighs in favour of disclosure.

However, I am satisfied with the Agency's explanation as to why copies of the meeting minutes are not distributed to residents. While the Applicant's purpose for seeking access to Document 2 would be achieved through disclosure, I consider it would also be satisfied through inspecting a copy of the centrally held document in line with Agency procedure.

(d) Whether the individuals to whom the information relates object, or would be likely to object to the release of the information

The Agency advised it consulted with Agency staff, whose personal affairs information is included in Document 2, and they objected to the release of this information. As detailed above, while I acknowledge their objection, this is not a determinative factor.

¹² [2018] VCAT 229.

The Agency did not consult with residents and other third parties referenced in the document as it was of the view notification would be reasonably likely to cause them undue distress, was otherwise unreasonable in the circumstances or it was not practicable to do so.¹³

Given the nature of the sensitive personal affairs information and the circumstances in which it was obtained, I am of the view the residents, whose private personal information is detailed in Document 2, would be likely to object to the release of that information under the FOI Act.

- (e) Whether the disclosure of the information would, or would be reasonably likely to endanger the life or physical safety of any person¹⁴

There is no information before me to suggest this is a relevant factor in this case.

36. Having weighed up the above factors, I have determined disclosure of the personal affairs information of third parties in Document 2, with the exception of Agency staff names, would be unreasonable in the circumstances.
37. Accordingly, this information is exempt under section 33(1).
38. Regarding Agency staff names, I am of the view their personal affairs information in the document reflects their usual work duties as public sector employees in administering the Agency's functions. It does not concern their personal or private lives, in contrast to the residents. As such, I consider the right of access to information under the FOI Act outweighs the staff members' personal privacy in the circumstances of this matter.
39. Accordingly, I am not satisfied this information is exempt under section 33(1).

Section 35(1)(b) – Documents containing material obtained in confidence

40. A document is exempt under section 35(1)(b) if two conditions are satisfied:
- (a) disclosure would divulge information or matter communicated in confidence by or on behalf of a person or a government to an agency or a Minister; and
 - (a) disclosure would be contrary to the public interest as it would be reasonably likely to impair the ability of an agency or a Minister to obtain similar information in the future.

Was the information or matter communicated in confidence?

41. When determining whether the information was communicated in confidence, it is necessary to consider the position from the perspective of the communicator, noting that confidentiality can be expressed or implied from the circumstances of the matter.¹⁵
42. As detailed above, information in Document 2 was obtained in the course of the Agency's administration of the Disability Act.
43. There is nothing on the face of Document 2 to indicate the information was provided in confidence. However, a document does not need to be marked 'confidential' for the content to be considered information communicated in confidence.¹⁶
44. I have considered the Applicant's position, as expressed in their submission, which accompanied their application for review.

¹³ Section 33(2C).

¹⁴ Section 33(2A).

¹⁵ *XYZ v Victoria Police* [2010] VCAT 255 at [265].

¹⁶ *Williams v Victoria Police* [2007] VCAT 1194 at [75].

45. However, I accept the Agency's position that SSA residents expect the information discussed at the resident meetings, which concerns issues relevant to their domestic and personal lives, will not be disclosed to others who were not in attendance at the meeting without their express permission.
46. Further, I accept the residents would have provided information in the meeting forum with the expectation the meeting minutes would only be used by the Agency to assist in the effective management of the SSA and to document their collective decision making. I consider it unlikely residents would expect their input during private meetings about their residential care and personal lives would be released, without restriction, through the FOI process.
47. In light of the sensitive and personal nature of the information and the context in which it was obtained by the Agency, I am satisfied certain information in Document 2 was communicated by individuals to the Agency in confidence.
48. Accordingly, I am satisfied disclosure of Document 2 would divulge information communicated in confidence to the Agency.

Would disclosure be contrary to the public interest?

49. Section 35(1)(b) also requires consideration of whether an Agency would be impaired from obtaining similar information in the future if the information were to be disclosed under the FOI Act. This means I must be satisfied that, if the information were to be disclosed, others in the position of the communicator would be reasonably likely not to provide similar information to the Agency in the future.
50. In this case, I accept dissemination of information provided to the Agency during private resident meetings would undermine the privacy of the meeting process and may in turn result in the reluctance of residents to participate freely in future meetings. This could have a detrimental effect on their ability to actively engage in collective decision making and to exercise control over their domestic living arrangements and home environment.
51. Further, I accept the Agency's submission that disclosure of meeting minutes could impair the Agency's ability to provide a safe and supportive environment for residents to freely discuss and express their personal views and, therefore, hinder the Agency's ability to best serve the individual needs of disability services clients.
52. Therefore, I am satisfied disclosure of information in Document 2 would disclose matters communicated to the Agency in confidence and its disclosure would be reasonably likely to impair the ability of the Agency to obtain similar information in future.
53. Accordingly, I am satisfied certain information in Document 2 is exempt under section 35(1)(b).

Deletion of exempt or irrelevant information

54. 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.
55. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'¹⁷ and the effectiveness of the deletions. Where

¹⁷ *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 25.¹⁸

56. The Applicant has advised they would be willing to accept an edited version of the requested documents 'only if they are considered to contain confidential information'.
57. I have considered the effect of deleting exempt information from Document 2. Given that the exemptions discussed above apply either in part or in full to Document 2, in my view, it is not practicable to delete the exempt information and provide a redacted version of the document to the Applicant.

Conclusion

58. On the information available, I am satisfied Document 2 is exempt under sections 31(1)(a), 33(1), 35(1)(b).
59. As I am satisfied it is not practicable to provide an edited copy of the document with exempt information deleted, I have determined to refuse access to Document 2 in full.

Other matters

60. As noted above, I have been advised resident meeting attendees can view meeting minutes upon request. Accordingly, the Applicant may view the minutes outside of the FOI Act in accordance with the Agency's procedures.

Review rights

61. If either party to this review is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.¹⁹
62. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.²⁰
63. The Agency may apply to VCAT for a review up to 14 days the date it is given this Notice of Decision.²¹
64. 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.
65. 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.²²

When this decision takes effect

66. 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.

¹⁸ *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].

¹⁹ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

²⁰ Section 52(5).

²¹ Section 52(9).

²² Sections 50(3F) and (3FA).