

Notice of Decision and Reasons for Decision

Applicant:	'AV8'
Agency:	Court Services Victoria
Decision date:	12 December 2019
Exemptions considered:	Sections 29B, 33(1)
Citation:	'AV8' and Court Services Victoria (<i>Freedom of Information</i>) [2019] VICmr 198 (12 December 2019)

FREEDOM OF INFORMATION – internal memoranda – Magistrates' Court – judicial and quasi-judicial – Court staff – internal emails – personal affairs information – 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.

My decision on the Applicant's request is the same as the Agency's decision.

I am satisfied the documents are exempt under sections 29B and 33(1).

As I have determined it would be practicable to provide the Applicant with an edited copy of certain documents with exempt information deleted in accordance with section 25, I have determined to release certain documents in part and certain documents in full.

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

12 December 2019

Reasons for Decision

Background to review

1. On 1 March 2018, the Applicant made a request to the Agency for access to certain documents relating to themselves and certain decisions made by named Magistrates.
2. On 18 May 2018, the Agency decided to refuse to grant access to the documents sought by Applicant in accordance with section 25A(1).
3. The Applicant requested the Information Commissioner review the Agency's decision.
4. On 30 September 2019, having conducted a review, I decided:
 - (a) the work involved in the Agency processing the request would not substantially and unreasonably divert the Agency's resources from its other operations; and
 - (b) the Agency is required to identify any documents, should they exist, that fall within the scope of parts 1 and 2 of the Applicant's request and assess those documents in accordance with the FOI Act.
5. Parts 1 and 2 of the Applicant's relevant original request are:
 1. Any correspondence in relation to [the applicant] that is not related to any court proceedings, including any complaints [the applicant has] filed.
 2. Any investigations conducted or not in respect to any complaint lodged by [the applicant].
6. On 26 November 2019, the Agency processed the request in accordance with my decision. It decided to release 22 pages in full, release two documents in part and refuse access to five documents in full.
7. The documents provided to the Applicant in full are correspondence between the Applicant and the Agency.

Review

8. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
9. I have examined copies of the documents subject to review.
10. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
11. I have considered all communications received from the parties, including:
 - (a) the Agency's decision on the FOI request; and
 - (b) the Applicant's review application.
12. In undertaking my review, I have had regard to the object of the FOI Act, which is to create a general right of access to information in the possession of the Government or other public bodies, limited only by exceptions and exemptions necessary to protect essential public interests, privacy and business affairs.

Review of exemptions

13. The Agency relies on the exemptions in sections 29B and 33(1) to refuse access to the documents in full and in part. The Agency's decision letter sets out the reasons for its decision.

Section 29B

14. A document is an exempt document if it is a document of Court Services Victoria that relates to the exercise of a judicial or quasi-judicial function of a court or the Victorian Civil and Administrative Tribunal (**VCAT**).
15. In deciding if a document is exempt under section 29B, I have had regard to case law about how the broadly equivalent section 5 in the *Freedom of Information Act 1982* (Cth) (**Commonwealth FOI Act**) is interpreted. These cases indicate judicial or quasi-judicial information should be broadly interpreted as compared to administrative information, which should be narrowly interpreted.
16. In *Bienstein v Family Court of Australia*,¹ the Federal Court held documents, that would normally be described as 'administrative' and did not affect a judicial determination directly, were nonetheless 'judicial documents' as they are closely related to judicial independence. The Court considered documents that affect judicial independence should not be subject to the Commonwealth FOI Act.
17. This approach was broadened by the High Court of Australia in *Kline v Official Secretary to the Governor General (Kline decision)*.² The Court narrowed administrative documents to documents that relate to logistical support, such as travel and accommodation arrangements. The Court found any documents 'preparatory to an exercise of a substantive power or to the performance of a substantive function' should not be subject to release under the Commonwealth FOI Act.
18. In this case, having regard to the above Court judgments, I find the memoranda addressed to the acting, deputy or chief Magistrates are documents that relate to judicial independence and not merely documents that relate to logistical support or the administrative processes of the Magistrates' Court.
19. Therefore, I am satisfied Documents 3 to 7 relate to the exercise of a judicial or quasi-judicial function of a court and are exempt under section 29B.

Section 33(1)

20. 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;³ and
 - (b) such disclosure would be 'unreasonable'.
21. 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.⁴
22. 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 of a matter.

¹ (2008) 251 ALR 453.

² [2013] HCA 52.

³ Sections 33(1) and (2).

⁴ Section 33(9).

23. Section 33(2A) requires, in deciding whether the disclosure of a document would involve the unreasonable disclosure of information relating to the personal affairs of any person, I must take into account whether disclosure of the information would, or would be reasonably likely to, endanger the life or physical safety of any person. I do not consider this to be a relevant factor in this case.
24. In deciding whether disclosure of a document would involve the unreasonable disclosure of a third party's personal affairs information, an agency must notify the person that an FOI request has been received for a document containing their personal information and seek their views on disclosure of the document.⁵
25. The Agency advised it consulted with relevant third parties. I have taken their responses into consideration in my decision.

Do the documents contain personal affairs information?

26. The documents contain the following personal affairs information of people other than the Applicant:
 - (a) names;
 - (b) position titles;
 - (c) email addresses;
 - (d) phone numbers; and
 - (e) the physical address of the Agency and its DX number and fax number.

Would disclosure of the personal affairs information be unreasonable?

27. In most instances I consider it would not be unreasonable to disclose the names and position titles of Agency staff, regardless of their seniority, where they are merely carrying out their usual duties or responsibilities as public servants.
28. However, I have decided disclosure of this information would be unreasonable in the circumstances, for the following reasons:
 - (a) I note the information provided by the third parties consulted during the processing of the FOI request that their names are not generally disclosed to the Applicant, as correspondence is generally signed by the Chief Magistrate.
 - (b) I also note one third party expressed concerns with the release of their name to the Applicant.
 - (c) Given the nature of the information on file, it is reasonably likely the Applicant will have ongoing contact with the Agency that may be adversely affected by the disclosure of the names of administrative Agency officers.
 - (d) The decision makers in this matter are the Magistrates. I consider the requirement for transparency relating to their decision making has been met by the disclosure of their names.

⁵ Section 33(2B).

29. Therefore, I am satisfied personal affairs information in the documents is exempt under section 33(1).

Deletion of exempt or irrelevant information

30. 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.
31. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'⁶ 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 25.⁷
32. Having reviewed the content of the documents, I am satisfied it would be practicable to provide the Applicant with an edited copy of certain documents with information exempted under section 33(1) deleted, as to do so would not require substantial time and effort, and the edited documents would retain meaning. I am satisfied it would not be practicable to provide an edited copy of documents exempt under section 29B.

Conclusion

33. On the information before me, I am satisfied the documents are exempt under sections 29B and 33(1).
34. As I have determined it would be practicable to provide the Applicant with an edited copy of certain documents with exempt information deleted in accordance with section 25, I have determined to release certain documents in part and certain documents in full.
35. The Schedule of Documents in **Annexure 1** sets out my decision in relation to each document.

Review rights

36. 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.⁸
37. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.⁹
38. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹⁰
39. 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.
40. 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.¹¹

⁶ *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].

⁷ *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].

⁸ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

⁹ Section 52(5).

¹⁰ Section 52(9).

¹¹ Sections 50(3F) and (3FA).

When this decision takes effect

41. 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.

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision
<i>This schedule includes only those documents refused in full or in part.</i>					
1.	[Date]	Emails between Agency staff	1	Release in part Section 33(1)	Release in part Section 33(1), 25 The document is to be released with the following exempt information deleted in accordance with section 25: <ul style="list-style-type: none"> all names, position titles, email addresses, phone numbers, physical addresses, DX numbers and fax numbers.
2.	[Date]	Emails between Agency staff	1	Release in part Section 33(1)	Release in part Section 33(1), 25 The document is to be released with the following exempt information deleted in accordance with section 25: <ul style="list-style-type: none"> all names, position titles, email addresses, phone numbers, physical addresses, DX numbers and fax numbers.
3.	[Date]	Memorandum to Deputy Chief Magistrate	1	Refuse in full Section 29B	Refuse in full Section 29B

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision
4.	[Date]	Memorandum to Acting Chief Magistrate	3	Refuse in full Section 29B	Refuse in full Section 29B
5.	[Date]	Memorandum to Chief Magistrate	1	Refuse in full Section 29B	Refuse in full Section 29B
6.	[Date]	Memorandum to Acting Chief Magistrate	1	Refuse in full Section 29B	Refuse in full Section 29B
7.	[Date]	Memorandum to Acting Chief Magistrate	1	Refuse in full Section 29B	Refuse in full Section 29B