

Notice of Decision and Reasons for Decision

Applicant:	'AT4'
Agency:	Metropolitan Fire and Emergency Services Board
Decision date:	22 November 2019
Exemptions considered:	Sections 31(1)(a) and 33(1)
Citation:	'AT4' and Metropolitan Fire and Emergency Services Board (<i>Freedom of Information</i>) [2019] VICmr 176 (22 November 2019)

FREEDOM OF INFORMATION – insurance policy with schedule – policy renewal notice – prejudice proper administration of the law in a particular instance

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 the documents in part.

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

22 November 2019

Reasons for Decision

Background to review

1. The Applicant, [redacted – personal information], made a request to the Agency for access to the following documents:

[Redacted – background to request]. Who is liable to pay for lawyers who came to [legal proceedings] and how much is paid and/or incurred (liable to pay). My query request is for all documents including any invoices, quotes, insurance policy and insurance related documents, insurance policy representation / claim documents, emails / mail correspondence that includes or mentions about any costs paid and/or incurred either directly (example invoice paid and/or incurred) and/or indirectly such as insurance policy represented and/or used. Query includes any insurance policy that is paid and/or incurred related to any matter related to [named person], [named person] and/or [named person] in respect of legal or any other matter related to bullying, harassment and/or [legal proceedings]. In other words, I am seeking to find all and/or any amount paid and/or incurred by [the Agency] for individuals – [named person], [named person] and/or [named person] either through insurance or invoice, in respect to legal or any other matter related to bullying, harassment and/or [legal proceedings].
2. In its decision, the Agency identified two documents falling within the terms of the Applicant's request. It decided to refuse access to both documents in full.

Review

3. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
4. I have been briefed by OVIC staff who inspected the documents claimed to be exempt under section 31(1).¹
5. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
6. I have considered all communications and submissions received from the parties, including:
 - (a) the Agency's decision on the FOI request;
 - (b) the information provided with the Applicant's review application;
 - (c) the Agency's submissions dated 3 July 2019 and further correspondence dated 23 September 2019 and 28 October 2019.
7. 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

8. The Agency relied on the exemptions in sections 31(1)(a) and 33(1) to refuse access to the documents. The Agency's decision letter sets out the reasons for its decision.

Section 33(1) – Personal affairs information

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.

9. 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'.

Do the documents contain personal affairs information?

- 10. 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
- 11. It has also been held information relates to an individual's personal affairs if it 'concerns or affects that person as an individual'.⁴
- 12. 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
- 13. Document 1 is an insurance policy with a schedule. It contains the terms of the Agency's Directors and Officers Liability insurance policy for the period [financial year], with the name, position title and signature of a staff member employed at the insurance company.
- 14. Document 2 is a Premium Renewal Notice for the period [financial year]. It contains details of the total payable premium amount, a list of insurance products and corresponding policy numbers, remittance advice with banking details, a reference number and handwritten notes with the initials of an Agency officer and the name of the insurance company employee noted by the Agency officer.
- 15. Accordingly, I am satisfied both documents contain the personal affairs information of individuals other than the Applicant.

Would disclosure of the personal affairs information be unreasonable?

- 16. The concept of 'unreasonable disclosure' involves determining whether the public interest in the disclosure of official information is outweighed by the personal interest in privacy.
- 17. In determining whether disclosure of the personal affairs information in the documents would be unreasonable, I have considered the following factors:

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

The personal affairs information contained in the documents comprises the initials of an Agency officer, names of insurance company employees, position title, a signature and the handwritten notes of an Agency officer.

The information was obtained and recorded by the Agency in the context of renewing its Directors and Officers Liability insurance policy. Policies of this nature are purchased by agencies to ensure that the agency will be indemnified for any losses incurred as a result of, amongst other things, legal action brought against its Directors or Officers. I am satisfied that the information was obtained in circumstances that relate to the Agency officers and insurance company

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].

employees performing their professional roles, rather than information of a private or personal nature. This weighs in favour of disclosure.

(b) 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.

On the information available, it is unclear what the Applicant's personal interest in obtaining access to the documents may be. There is no information before me to enable me to determine whether the Applicant's purpose for seeking the documents would be achieved by granting access to any personal affairs information in the documents.

(c) Whether any public interest would be promoted by the release of the information

The wording of the Applicant's FOI request suggests [redacted – personal information].

I do not consider the public interest would be promoted by release of the individuals' personal affairs information to the Applicant. This weighs against disclosure.

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

While processing the Applicant's FOI request the Agency consulted the insurance company and the employee of the insurance company concerning release of the documents and their personal affairs information. The insurer advised that the employee only objected to release of their signature but consented to disclosure of their name, the fact of their employment with the insurer and their position title, in circumstances where the employee was the official signatory on the policy. The insurer also advised it did not object to release of the documents. This weighs in favour of disclosure especially where the documents are standard form certificates.

I do not have any information before me as to the views of the individuals referenced in the handwritten note contained in Document 2 regarding their personal affairs information.

Having regard to the circumstances in which the documents were created and the context in which the information was obtained by the Agency, I am of the view the individuals referred to in the handwritten notes would be reasonably likely to object to the release of their personal affairs information. This weighs against disclosure.

(e) Whether release of the information could lead the persons to whom it relates suffering stress and anxiety

The documents relate to the Agency's liability insurance policy and schedule and a premium renewal notice.

In light of the circumstances in which the personal affairs information was obtained, I consider release of the information of individuals referred to in the handwritten notes may be reasonably likely to cause stress and anxiety to the individuals to whom the information relates.

(f) Whether the disclosure of the information would, or would be reasonably likely to endanger the life or physical safety of any person⁶

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

18. Having weighed the above factors, I am satisfied disclosure of some of the personal affairs information in the documents would be unreasonable in the circumstances.
19. While I note the Agency's submission makes reference 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,⁷ I do not consider my decision to disclose personal affairs information in these circumstances contravenes section 13 of the Charter. Disclosure of the information in Document 1, relating to the employee of the insurance company, is not of a nature that would provide for arbitrary interference with that individuals 'privacy, family or home' given the personal affairs information has arisen in the context of their professional employment. Moreover, that individual has consented to the disclosure of their personal affairs information, except for their signature.
20. The Schedule of Documents in **Annexure 1** sets out my decision in relation to the application of section 33(1) to the documents.

Section 31(1)(a) – Law enforcement documents

21. 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;
- ...

22. 'Reasonably likely' means that there is a real chance of an event occurring; it is not fanciful or remote.⁸
23. 'Prejudice' means to hinder, impair or undermine and includes actual prejudice as well as impending prejudice.⁹
24. '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.¹⁰
25. In its decision, the Agency stated that disclosure of the documents would or would be reasonably likely to prejudice the proper administration of the law in a particular instance.
26. The Agency's decision letter states:

⁶ Section 33(2A).

⁷ Section 38 of the *Charter of Human Rights and Responsibilities 2006* (Vic).

⁸ *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.

⁹ *Ibid*, *Bergman* at [66], referring to *Sobh v Police Force of Victoria* [1994] VicRp 2; [1994] 1 VR 41 (Nathan J) at [55].

¹⁰ *Cichello v Department of Justice (Review and Regulation)* [2014] VCAT 340 at [24].

The documents sought are exempt under s 31(1)(a) of the FOI Act because disclosure would, or would be reasonably likely to prejudice the proper administration of the law in a particular instance. That particular instance is the ongoing [legal proceeding] in which you, the [the Agency] and the individuals named in your request are all parties (“[legal] proceeding”).

Disclosure of the documents would be reasonably likely to prejudice the position of one or more of the parties in circumstances where the matter is still being considered by the [relevant body].

27. I consider the [legal] proceedings brought by the Applicant to be ‘a particular instance’ for the purposes of section 31(1)(a).
28. On [date], OVIC was informed that the [legal] proceedings referenced in the Agency decision were discontinued by the Applicant. As a result, the circumstances on which the original decision to apply section 31(1)(a) was based have significantly changed. The Agency, however, maintains that the documents are exempt under section 31(1)(a) as a result of two new ‘complaints’ lodged by the Applicant relating to the same series of events as those which resulted in the [legal] proceeding.
29. The documents comprise the Agency’s insurance policies and record the premium and coverage under those policies. On the information before me, the documents do not directly relate to the [legal] proceedings or to other complaints and do not appear to be the subject of dispute. Rather, the documents record the insurance policies under which the Agency’s involvement in the proceeding may be, or may have been, funded by the insurance provider.
30. For the above reasons, I am not satisfied that release of the documents would be reasonably likely to prejudice the employment proceedings or complaint processes as they relate to the Applicant and the Agency, including any conciliation process. I am of the view that disclosure of the insurance policy documents would not be reasonably likely to prejudice the enforcement or proper administration of the law in a particular instance, especially in circumstances where the [legal] proceedings have been discontinued.
31. Accordingly, I am satisfied section 31(1)(a) does not apply to the documents.

Deletion of exempt or irrelevant information

32. 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.
33. Determining what is ‘practicable’ requires consideration of the effort and editing involved in making the deletions ‘from a resources point of view’¹¹ 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 25.¹²
34. 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 it would not require substantial time and effort, and the edited documents would retain meaning.

¹¹ *Mickelburgh 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 at [82].

¹² *Honeywood v Department of Human Services* [2006] VCAT 2048 [26]; *RFJ v Victoria Police FOI Division (Review and Regulation)* [2013] VCAT 1267 at [140], [155].

Conclusion

35. On the information available, I am satisfied the exemption in section 33(1) applies to the documents. I have decided to grant access to the documents in part.
36. The Schedule of Documents in **Annexure 1** sets out my decision in relation to each document.

Review rights

37. 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.¹³
38. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹⁴
39. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹⁵
40. 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.
41. 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

42. 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.

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]	[Company] Insurance Policy with Schedule	30	<p>Refused in full</p> <p>Sections 31(1)(a) and 33(1)</p>	<p>Release in part</p> <p>Section 33(1)</p> <p>The document is to be released to the Applicant with the following information deleted as it is exempt under section 33(1):</p> <ul style="list-style-type: none"> • Signature on page 2. <p>The remaining pages are to be released in full.</p>	<p>Section 33(1): I am satisfied disclosure of the personal affairs information, namely the signature of the insurer's employee, contained in this document is unreasonable in the circumstances. Accordingly, it is exempt under section 33(1).</p>
2.	[Date]	[Company] Premium Renewal Notice	1	<p>Refused in full</p> <p>Sections 31(1)(a) and 33(1)</p>	<p>Release in part</p> <p>Section 33(1)</p> <p>The document is to be released to the Applicant with the following information deleted as it is exempt under section 33(1):</p> <ul style="list-style-type: none"> • Handwritten notes of an Agency officer, including the name of the insurer's employee and Agency officer's initials. <p>The remainder of the page is to be released in full.</p>	<p>Section 33(1): I am satisfied disclosure of the personal affairs information contained in this document is unreasonable in the circumstances. Accordingly, it is exempt under section 33(1).</p>