

Notice of Decision and Reasons for Decision

Applicant:	'AZ2'
Agency:	Glen Eira City Council
Decision date:	30 December 2019
Provisions considered:	Sections 25A(5), 33(1)
Citation:	'AZ2' and Glen Eira City Council (<i>Freedom of Information</i>) [2019] VICmr 228 (30 December 2019)

FREEDOM OF INFORMATION – council documents – disputes and complaints – complaints made about an agency officer – refusal to process an FOI request – 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 decision to refuse access to documents requested by the Applicant under the FOI Act.

I am satisfied the requirements for the application of section 25A(5) are met. Accordingly, I have decided to refuse to grant access to the requested 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 December 2019

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency for access to certain documents.
2. Following consultation with the Agency, the Applicant amended their initial request and sought access to the following documents:
 - (1) All complaints made against [named Agency officer] received or held by the Council in any documentary form (including electronically, letters, emails, online forms and to any officer or Councillor of the Council) for the period of [date range].
 - (2) All data generated by Pathways in the category of “[nominated section of the Agency] Officer Complaints” when using the search term “[named Agency officer]” and for the period of [date range] and when using the appropriate template(s) needed to access the Pathways data.
 - (3) All “query extract files” generated by Pathways in relation to the search term “[named Agency officer] within the Pathways category of “[nominated section of the Agency] Officer Complaints” for the period of [date range] and when using the appropriate template(s) needed to access the Pathways data.
 - (4) Information involving the “personal affairs” of third parties as that term is defined in s 33(9) of the FOI Act, such as names and addresses, are expressly excluded from the scope of this request except in relation to [named Agency officer].
3. The Agency relies on section 25A(5) to refuse to grant access to documents in accordance with the Applicant’s request.
4. Section 25A(5) provides an agency may refuse to grant access to documents in accordance with an FOI request, without having identified any relevant documents if it is apparent from the nature of the request all documents would be exempt under the FOI Act, and where it is not possible to release an edited copy with exempt material deleted, or it is clear the applicant does not seek an edited copy of the documents.
5. In refusing to grant access to documents under section 25A(5), the Agency relies on the exemption in section 33(1).
6. The reasons for the Agency’s decision are set out in its decision letter dated [date].

Review

7. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency’s decision to refuse access.
8. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
9. I have considered all communications and submissions received, including:
 - (a) the Agency’s decision on the FOI request, dated [date];

- (b) information provided with the Applicant’s review application, the Applicant’s submissions and various communications with OVIC staff during the review; and
 - (c) the Agency’s submission, dated [date] and information provided by the Agency during the review.
10. During the review, the Applicant confirmed they had previously received information from the Agency in relation to complaints [redacted] made about the Agency officer named in their FOI request. Accordingly, I excluded such documents from the scope of this review as the Applicant already has a copy.
11. 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

12. 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 sought in the request would be 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?

13. The essential quality or character of the documents, as described in the Applicant’s request, are any complaints, data related to complaints and extract files related to complaints made about a named Agency officer.

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

14. In refusing access to the requested documents under section 25A(5), the Agency submitted any documents falling within the Applicant’s request would be exempt under section 33(1).

Section 33(1) – Documents containing personal affairs information

15. 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

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

² Sections 33(1) and (2).

(b) such disclosure would be 'unreasonable'.

Would the documents contain the personal affairs information of individuals other than the Applicant?

16. 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.³
17. It has also been held information relates to an individual's personal affairs if it 'concerns or affects that person as an individual'.⁴
18. 'Personal affairs information' is interpreted broadly to include matters related to the health, private behaviour, home life or personal or family relationships of individuals.⁵
19. A third party's opinion or observations about another person's conduct can constitute information related to the third party's personal affairs.⁶
20. Information relating to a person's work performance can relate to their personal affairs.⁷
21. I note the Applicant confirmed during the review they no longer seeks access to specific personal affairs information in the documents, including that of the named Agency officer as per point (d) of their original request.
22. I have reviewed correspondence and been briefed by OVIC staff, who attempted to advise the Applicant that personal affairs information extends beyond the name and address of a third party. I further acknowledge attempts by OVIC staff to address the Applicant's view the application of section 33(1) implied any documents relevant to the request terms were personal or private documents, rather than documents in the Agency's possession and subject to the FOI Act.
23. I confirm the application of section 33(1) does not mean any documents sought are personal or private. Rather, the requested documents would necessarily need to be in the possession of the Agency, but would contain personal affairs information that either names or could identify third parties other than the Applicant.
24. This means, despite removing the Agency officer's name from the documents, it would still be possible to identify the officer as the subject of the documents.
25. In relation to the first limb of section 33(1), the Agency submitted 'every document captured by the amended request must relate to the [named Agency officer]' and '[d]isclosure of any documents answering the amended request would necessarily involve the disclosure of 'information relating to the personal affairs of' the named Agency officer.
26. I accept the Agency's submission that any documents captured by the Applicant's amended request would relate to the Agency officer's personal affairs information as they are named in the request. As discussed above, even deleting the Agency officer's name from any documents would still result in the officer being able to be identified as the subject of the documents by the Applicant and any persons with knowledge of or involvement in any events to which any documents relate.

³ Section 33(9).

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

⁵ *Re F and Health Department* (1988) 2 VAR 458 as quoted in *RFJ v Victoria Police FOI Division* [2013] VCAT 1267 at [103].

⁶ *Richardson v Business Licensing Authority* [2003] VCAT 1053, cited in *Davis v Victoria Police (General)* [2008] VCAT 1343 at [43], *Pritchard v Victoria Police (General)* [2008] VCAT 913 at [24], *Mrs R v Ballarat Health Services (General)* [2007] VCAT 2397 at [13].

⁷ *Mickelborough v Victoria Police* (unreported, Victorian Civil and Administrative Tribunal, Member O'Halloran, 19 February 2009) 39; *Gunawan v Directorate of School Education* (1994) 6 VAR 418, 425.

27. Accordingly, I am satisfied any documents would contain information relating to the personal affairs of persons other than the Applicant, primarily the named Agency officer.

Would release of the personal affairs information be unreasonable?

28. Consideration of whether disclosure of personal affairs information would be unreasonable involves balancing the public interest in the disclosure of official information with the personal interest in protecting the privacy of a third party in the circumstances of a matter.
29. I adopt the view expressed by the Supreme Court of Victoria Court of Appeal in *Victoria Police v Marke*,⁸ 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'.
30. 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'.⁹
31. While the FOI Act provides for a general right to seek access to documents, in determining whether disclosure would be unreasonable under section 33(1), an applicant's motive or interest in obtaining access to documents may be a relevant factor to be taken into consideration.
32. Even where an applicant claims to know the identity of a third party, disclosure of the third party's personal affairs information under the FOI Act may still be unreasonable in the circumstances.¹⁰
33. The Agency's submission references a number of cases in which the Victorian Civil and Administrative Tribunal (**VCAT**) determined an applicant's motives for seeking access to documents arose in conjunction with persistent complaints about an agency officer.
34. In addition to considering the views of the Applicant and Agency, I have given weight to the following factors in determining if disclosure of personal affairs information in the documents would be unreasonable in the circumstances:

(a) The nature of the personal affairs information

I consider any documents would include personal affairs information about the conduct or performance of the named Agency officer and the names, addresses or identifying information of other third parties, as well as sensitive information such as views and personal experiences.

I consider any information of this nature would be personal and sensitive as it would relate to the named Agency officer's work performance. This factor weighs against disclosure.

(b) The circumstances in which the personal affairs information was obtained

Personal affairs information in any documents would have been obtained by the Agency by way of complaints made by members of public or others in relation to the conduct or performance of the named Agency officer. Any such information would be likely to have been obtained by the Agency from third parties on a voluntary basis.

Based on the nature of the documents sought, I am of the view any third parties who may have provided information to the Agency for this purpose, would not reasonably expect for

⁸ [2008] VSCA 218 at [76].

⁹ *Ibid* at [104].

¹⁰ *AB v Department of Education and Early Childhood Development* [2011] VCAT 1263 at [58]; *Akers v Victoria Police* [2003] VCAT 392.

their personal affairs information to be disclosed to the Applicant under the FOI Act. This factor weighs against disclosure.

(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.¹¹

It is not clear how the Applicant proposes to use any requested documents. However, it appears the Applicant has a strong personal interest in obtaining access to the documents arising from what appears to be the Applicant's longstanding concerns with the conduct and performance of the named Agency officer.

[Redacted], I am not satisfied any legitimate purpose would be served or achieved by disclosure of the requested documents to the Applicant. Indeed, I note VCAT has held personal affairs information sought by complainants exempt under section 33(1).¹² This factor weighs against disclosure.

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

There is no information before me to suggest the public interest would be promoted by disclosure of the requested documents to the Applicant. Rather, in the circumstances, I am of the view the public interest lies in preserving the privacy of the named Agency officer. This factor weighs against disclosure.

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

Having regard to the nature of the requested documents, I am of the view the named Agency officer and any other third party would be reasonably likely to object to release of their personal affairs information in any documents to the Applicant under the FOI Act. This factor weighs against disclosure.

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

Having considered the nature of the information and the circumstances in which it would have been obtained or created, I am satisfied its disclosure to the Applicant would be reasonably likely to lead to the named Agency officer suffering stress and anxiety and could reasonably have a detrimental impact on the wellbeing of the named Agency officer. This factor weighs against disclosure.

(g) Whether the disclosure of the information would, or would be reasonably likely to endanger the life or physical safety of any person¹³

There is no information before me to establish this factor is relevant in the circumstances.

35. Having considered the above factors, I am satisfied disclosure of personal affairs information in any requested documents would be unreasonable in the circumstances.

¹¹ *Victoria Police v Marke* [2008] VSCA 218 at [104].

¹² *Proctor v Mornington Peninsula Shire Council* [2018] VCAT 638 at [96]-[97].

¹³ Section 33(2A).

36. Accordingly, on the information before me and given the nature of the requested documents, I am satisfied any relevant documents would be exempt under section 33(1).

Is there scope to provide an edited copy of the documents requested?

37. 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.

38. 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

39. While I note the Applicant no longer seeks access to personal affairs information, having considered the nature of the requested documents, I am satisfied deleting all exempt information from the documents would render them meaningless given the substantial amount of information in the documents that would be exempt. Therefore, I am satisfied it would not be practicable to provide the Applicant with an edited copy of the requested documents in accordance with section 25.

Conclusion

40. On the information before me, I am satisfied the following requirements for the application of section 25A(5) are met:

- (a) the essential quality or character of the documents, as described in the Applicant's request, would be complaints relating to the conduct or performance of the named Agency officer;
- (b) given the nature of the requested documents, I am satisfied any relevant documents, should they exist, would be exempt under section 33(1)(a); and
- (c) while the Applicant does not seek access to personal affairs, I am satisfied it would not be practicable to provide an edited copy of the requested documents under section 25 as to do so would render them meaningless.

41. Accordingly, I have decided to refuse to grant access to the requested documents in accordance with the Applicant's FOI request under section 25A(5).

Review rights

42. 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

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

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

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).

¹⁷ Section 52(5).

¹⁸ Section 52(9).

45. 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.
46. 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

When this decision takes effect

47. 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.

¹⁹ Sections 50(3F) and (3FA).