

Notice of Decision and Reasons for Decision

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| Applicant: | 'BD5' |
| Agency: | Emergency Services Superannuation Board (t/a ESSSuper) |
| Decision Date: | 27 February 2020 |
| Exemption considered: | Section 33(1) |
| Citation: | 'BD5' and Emergency Services Superannuation Board (t/a ESSSuper) (Freedom of Information) [2020] VICmr 38 (27 February 2020) |

FREEDOM OF INFORMATION – personal affairs information – superannuation – payment to beneficiary – assessment of evidentiary material

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 some of the documents.

However, in the course of review, the Agency agreed to release Document 51 to the Applicant.

My reasons for decision follow.

Sven Bluemmel
Information Commissioner
27 February 2020

Reasons for Decision

Background to review

1. The Applicant's late [parent] (**the deceased**) was a member of the Agency's Superannuation Scheme.
2. On [their] death, the Agency determined to pay the death benefit equally between the Applicant and their siblings.
3. At a later stage, a third party made a claim for the deceased's death benefit, on the basis of being [their] domestic partner at the time of [the deceased's] death, and provided the Agency with relevant documents to support their claim.
4. The Applicant made a request to the Agency for access to the documents relating to the deceased's file.
5. In its decision, the Agency identified 72 documents falling within the terms of the Applicant's request. It decided to grant access to 50 documents in full and refuse access to 22 documents in full.

Review

6. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
7. I have examined copies of the documents subject to review.
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 from the parties, including:
 - (a) the Agency's decision on the FOI request;
 - (b) information provided with the Applicant's review application;
 - (c) the Agency's submission dated 21 January 2020; and
 - (d) correspondence between OVIC staff and the Agency.
10. 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

11. The Agency relied on the exemptions under sections 30(1) and 33(1) to refuse access to documents. The Agency's decision letter sets out the reasons for its decision.

Section 30(1)

12. On 20 February 2020, following informal discussions with OVIC staff, the Agency agreed to release the only document subject to 30(1) to the Applicant. This exemption is therefore not subject to review.

Section 33(1)

13. 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'.
14. 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
15. The concept of 'unreasonable disclosure' involves balancing the public interest in the disclosure of official information with the personal interest in privacy in the particular circumstances of a matter.

Do the documents contain information relation to the personal affairs information of individuals other than the Applicant?

16. The documents relate to correspondence between the Agency and a third party as well as evidentiary material provided by the third party in support of their claim for a death benefit.
17. I am satisfied this information relates to the personal affairs information of individuals other than the Applicant.

Would the disclosure of this personal affairs information be unreasonable?

18. The concept of 'unreasonable disclosure' involves balancing the competing public interest in disclosure of official information, with the personal interest in privacy. The following matters are particularly relevant, in the circumstances of this case:
 - (a) The nature of the personal affairs information – Having reviewed the content of the documents, I am satisfied they contain information that is highly personal and sensitive in nature. This weighs against disclosure.
 - (b) The extent to which the information is available to the public –The information within the documents is not publicly available. This weighs against disclosure.
 - (c) The circumstances in which the information was obtained – I am of the view the information in the documents was provided to the Agency for the purposes of assessing the death benefit claim on the understanding it will remain confidential. This weighs against disclosure.
 - (d) Whether any public interest would be promoted by release of the information – On 25 February 2020, the Applicant advised OVIC that the Agency has threatened the Applicant with legal proceedings and they require the documents in order to respond to the Agency's allegations.

The release of documents under the FOI Act is unconditional and unrestricted. I am of the view that should the Applicant require the documents to respond to legal proceedings, then the Applicant would be able to obtain the relevant documents by means other than FOI – such as a brief of evidence or by a legal subpoena.

¹ Sections 33(1) and (2).

² Section 33(9).

On the contrary, I am of the view that there is a greater public interest in the Agency maintaining the confidentiality of certain information provided by individuals. This preserves the Agency's ability to obtain information from third parties and other witnesses in the course of its assessments and investigations that are necessary for it to undertake its functions. These factors weigh against disclosure.

(e) Whether the individuals to whom the information relates object, or would be likely to object, to the release of the information – The Agency consulted with third parties, in accordance with section 33(2B). These third parties objected to the release of their personal affairs information. While this factor is not determinative, this weighs against disclosure.

19. Section 33(2A) requires that, 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 the disclosure of the information would, or would be reasonably likely to, endanger the life or physical safety of any person. However, I do not consider this to be a relevant factor in the circumstances.
20. In considering the above factors, I am of the view it would be unreasonable to release the personal affairs information contained in the documents. Accordingly, I have determined the documents are exempt in full under section 33(1).

Deletion of exempt or irrelevant information

21. 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.
22. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'³ 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 25.⁴
23. I have considered the effect of deleting exempt information from the documents. In my view, it is not practicable for the Agency to delete such information, because doing so would render the documents meaningless.

Conclusion

24. On the information available, I am satisfied the exemption in section 33(1) applies to the documents. As it is not practicable to edit the documents to delete exempt information, I have determined to refuse access to the documents in full.
25. In relation to Document 51 that was exempt under section 30(1), the Agency has agreed to release this document to the Applicant.

³ *Mickelborough 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].

⁴ *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].

Review rights

26. 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.⁵
27. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.⁶
28. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.⁷
29. 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.
30. 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.⁸

When this decision takes effect

31. 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.

⁵ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

⁶ Section 52(5).

⁷ Section 52(9).

⁸ Sections 50(3F) and (3FA).