

Notice of Decision and Reasons for Decision

Applicant:	'BN8'
Agency:	Murrindindi Shire Council
Decision date:	13 May 2020
Provision and exemption considered:	Sections 25A(5), 33(1)
Citation:	'BN8' and Murrindindi Shire Council (<i>Freedom of Information</i>) [2020] VICmr 133 (13 May 2020)

FREEDOM OF INFORMATION – personal affairs information – court attendance – witnesses – third party wages or compensation – refusal to process request on grounds all documents would be exempt

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 determined to refuse to grant access to the requested documents in accordance with the Applicant's request under section 25A(5).

The effect of my decision is the Agency is not required to process the Applicant's request.

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner

13 May 2020

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency for access to certain documents about how costs awarded against them were calculated in a legal proceeding:

I require the release of all documents that Council hold or sourced as being:
 - a) Withholding of wages and/or stipends from [specified number of] named persons, ...[who were] witnesses of the [specified] Court @ [location] and as known to Council
 - b) Agreements entered into by Council towards compensation, if any, for the [above] [number of] witnesses.
2. The Agency determined any documents falling within the terms of the Applicant's request, should they exist, would be exempt from release under section 33(1). Accordingly, the Agency refused to grant access to the documents in accordance with the request under section 25A(5). The Agency's decision letter of [date] sets out the reasons for its decision.

Review

3. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision.
4. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
5. I have considered relevant communications and submissions received from the Applicant and the Agency, including:
 - (a) the Agency's decision on the FOI request;
 - (b) submissions and other information provided by the Applicant and Agency during the review; and
 - (c) summaries of telephone conversations and other correspondence between OVIC staff, the Applicant and Agency during the review.
6. I have also had regard to the previous review application made by the Applicant concerning similar issues and the same individuals named in [their] current request. In that matter, I accepted the Agency's submission it was not a party to the legal proceeding and the [specified number of] named individuals (the **third parties**), were called as witnesses in the proceeding in their personal capacity, [redacted – personal information of third parties].
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 section 25A(5) to refuse to grant access to documents

8. The power under section 25A(5) is carefully circumscribed.¹ I must be satisfied of the following three requirements, 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 (**first limb**).
 - (b) Second, it must be apparent from the terms of the request that all documents relevant to the request would be exempt (**second limb**).
 - (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 a document² (**third limb**).
9. Section 25A(5) does not require an agency to identify any or all documents to which the request relates or to specify, in respect of each document, the relevant exemption under which a document is claimed to be exempt.
10. Accordingly, I am required to make my decision without having reviewed any of the requested documents, and in the absence of confirming whether any relevant documents may or actually exist.

Is the nature of the documents objectively apparent from the face of the Applicant's request?

11. The Applicant seeks access to documents about the '[w]ithholding of wages and/or stipends' of the third parties and any agreements entered into by the Agency for 'compensation' the third parties may have received following their appearance as witnesses in a court proceeding involving the Applicant.
12. I am satisfied the nature of the requested documents is objectively apparent from the specific terms of the Applicant's request. Accordingly, I am satisfied the first limb of section 25A(5) is met.

Would all documents, as described in the request, be exempt?

13. In refusing access to the requested documents under section 25A(5), the Agency determined any documents, should they exist, would be exempt under section 33(1).
14. In its decision letter, the Agency states:

Under section 33 documentation, affecting personal privacy is exempt. The personnel data, including wages and information regarding a person's employment is considered unreasonable disclosure of information relating to the personal affairs or any person. Therefore your request is refused in full under section 25A(5) due to the request being exempt under section 33.

¹ *Knight v Corrections Victoria* [2010] VSC 338 at [37].

² *Knight v Corrections Victoria* [2010] VSC 338.

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;³ and
 - (b) such disclosure would be ‘unreasonable’.
16. Information relating to the ‘personal affairs’ of a person includes information that identifies any person or discloses their address or location. It also includes any information from which such information may be reasonably determined.⁴
17. Personal affairs information that relates to an individual ‘concerns or affects that person as an individual’.⁵
18. Further, 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 potentially identify a third party.⁶

Would the requested documents contain personal affairs information?

19. Based on the terms of the Applicant’s request, I am satisfied the nature of the requested documents, should any exist, would contain the personal affairs information of the third parties, including their names, contact details, salary and other employment related details.
20. Further, in the case of an agreement for compensation entered into between the Agency and third parties, should any exist, I am satisfied the personal affairs information of the third parties could be reasonably determined from such documents.
21. Accordingly, I am satisfied the requested documents would contain the personal affairs information of the third parties.

Would release of the personal affairs information be unreasonable?

22. 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 particular circumstances of a matter.
23. In *Victoria Police v Marke*,⁷ the Victorian Court of Appeal 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’.
24. Further, ‘[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’.⁸

³ Sections 33(1) and (2).

⁴ Section 33(9).

⁵ *Hanson v Department of Education & Training* [2007] VCAT 123.

⁶ *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].

⁷ [2008] VSCA 218 at [76].

⁸ [2008] VSCA 218 at [79].

25. I note the Applicant is aware of the identities of the third parties in this matter. However, the release of personal affairs information can still be unreasonable even where the identity of a third party is known to an applicant.⁹

26. I have considered the following factors in determining whether disclosure of the personal affairs information of the third parties in the requested documents, should any exist:

(a) The nature of the personal affairs information

I consider any documents that fall within the scope of the Applicant's request, should any exist, would disclose personal information about the third parties, including their location, leave arrangements, salary or other financial payments. As such, I consider such information to be personal and not of a nature that would generally be freely available or disseminated to members of the public. This factor weighs against disclosure.

(b) The circumstances in which the information was obtained

I consider any documents that fall within the scope of the Applicant's request, should any exist, would contain information obtained and recorded by the Agency in relation to the third parties in the context of their employment [redacted] and in the context of them having been called to give evidence in a court proceeding in their personal capacity and not initiated by the Agency. In light of the nature of the personal affairs information, as set out at (a) above, I consider 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 in the circumstances.¹⁰

The Applicant seeks access to the requested documents to better understand the nature of costs awarded against them following a court proceeding and may inform any decision or action taken in any subsequent court proceeding.

I consider the Applicant's purpose would be achieved by obtaining access to the requested documents, should any exist, in that the Applicant would be able to confirm whether or not their concerns regarding whether the third parties received payment or compensation from the Agency for those persons giving evidence against [them] in a court proceeding.

However, on balance, I am not satisfied the Applicant's interest in the information supports disclosure of the documents taking into account the other public interest factors considered.

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

On information before me, the Applicant's interest in obtaining access to the requested documents, should any exist, is primarily a personal matter [redacted].

I note the relevant court proceeding involving the Applicant was held more than [a specified number of] years ago and is now concluded.

⁹ *AB v Department of Education and Early Childhood Development* [2011] VCAT 1263 at [58]; *Akers v Victoria Police* [2003] VCAT 397.

¹⁰ *Victoria Police v Marke* [2008] VSCA 218 at [104].

There is no information before me to suggest the public interest would be promoted by the release of the personal affairs information sought. I consider this factor does not support disclosure.

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

In the context of this request, I am of the view the third parties, whose personal information would be captured in the requested documents, should any exist, would be reasonably likely to object to the release of their personal affairs information.

While the views of the third parties are a relevant consideration, they are not determinative.

However, in the circumstances of this matter, I consider this factor does not support 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 was obtained, I consider it is reasonably likely release of the documents would lead to the third parties to whom it relates suffering stress and anxiety. I consider 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 person¹¹

With regard to this particular review request, there is no information before me to suggest this is a relevant factor in this case.

27. Having considered the above factors, I am satisfied the requested documents, should an exist, would be exempt under section 33(1). Accordingly, I am satisfied the second limb of section 25A(5) is met.

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

28. Section 25 requires an agency to grant access to an edited copy of a document when it is practicable to delete exempt or irrelevant information and the applicant agrees to receiving such a copy.

29. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'¹² and the effectiveness of the deletions. Where deletions would render a document meaningless, they are not 'practicable', and release of an edited copy of a document is not required under section 25.¹³

30. Having considered the nature of the information sought in the requested documents that I have determined would be exempt under section 33(1), I am satisfied deletion of the exempt information in accordance with section 25 would not be practicable as deletion of the personal affairs information sought would render the documents, should any exist, meaningless.

31. Accordingly, I am satisfied there is no scope to provide an edited copy of the requested documents and the third limb of section 25A(5) is met.

¹¹ Section 33(2A).

¹² *Mickelburgh 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].

¹³ *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].

Conclusion

32. On the information before me, I am satisfied the following requirements for the application of section 25A(5) are met:
- (a) the exempt nature of the documents is apparent from the Applicant's request, that is, the documents sought would be exempt from release under section 33(1);
 - (b) all documents sought by the Applicant would be exempt for that reason; and
 - (c) there is no obligation for the Agency to provide an edited copy of the documents with exempt information deleted in accordance with section 25.
33. Accordingly, I have determined to refuse to grant access to the requested documents in accordance with the Applicant's request under section 25A(5).
34. The effect of my decision is the Agency is not required to process the Applicant's request.

Review rights

35. 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.¹⁴
36. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹⁵
37. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹⁶
38. If a review application is made to VCAT, my decision will be subject to any subsequent outcome of the VCAT proceeding or order of VCAT regarding the requested documents.
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.¹⁷

¹⁴ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

¹⁵ Section 52(5).

¹⁶ Section 52(9).

¹⁷ Sections 50(3F) and (3FA).