

Notice of Decision and Reasons for Decision

Applicant:	'BD8'
Agency:	Dental Health Services Victoria
Decision date:	5 March 2020
Exemptions considered:	Sections 33(1), 32(1)
Citation:	'BD8' and Dental Health Services Victoria (<i>Freedom of Information</i>) [2020] VICmr 41 (5 March 2020)

FREEDOM OF INFORMATION – workplace investigation – complaints – investigation report – report findings and recommendations – third party names

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.

I am not satisfied Document 1 is exempt under section 33(1). However, I am satisfied Document 2 (including all attachments) is exempt in full under section 32(1).

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
5 March 2020

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency for access to the following documents:
 1. I submitted a very detailed allegation of [redacted] against [name] to the CEO, [name]. I detailed how [substance of allegation]. I had this submission checked by a lawyer and by [name], [description of credentials]. After a great many promptings, and almost [specified period of time] later, I received my reply, from [name] as a tiny inclusion to a different matter. I have highlighted [their] letter which I have attached. I request all correspondence associated with [their] claimed investigation. If you are unable to find any such material I request that you state that this is the case.
 2. The second attachment is a draconian set of restrictions placed on me by [name]. [They] stated that this was on the advice of [name]. I would have expected that such important matters, including restriction of speech and academic freedom, would have required very detailed input from [name].

No such input was ever mentioned to me. [Redacted - details of academic pursuits]. Again I request that you seek such material and send it to me. Again I ask that if you cannot find such material that you state that this is the case.
 3. Attachment one is also associated with a complaint against [name] -- that of [substance of complaint]. Again this was a detailed submission checked by a lawyer.

Attachment one is [name] reply. I request that all [their] investigative notes over those [specified number of] months be given to me. Again I ask that if you cannot find such material that you state that this is the case.
2. In its decision, the Agency identified two documents falling within scope of the request, one of which has 14 attachments. The Agency released one document in part to the Applicant.
3. [Redacted – personal information of the Applicant]. The Applicant seeks records relating to a complaint made by the Applicant concerning another Agency employee and other matters relating to their employment.

Review

4. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
5. I have examined copies of the documents subject to review.
6. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
7. I have considered all communications and submissions received from the parties, including:
 - (a) the Agency's decision on the FOI request;
 - (b) the Applicant's review application and further information received [date]; and
 - (c) the Agency's submission dated [date].
8. 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

9. The Agency relied on sections 30(1), 32(1), 33(1), 35(1)(b) to refuse access to the documents in part. The Agency's decision letter sets out the reasons for its decision.
10. For the reasons set out below, I have only considered sections 32(1) and 33(1) in relation to this matter.

Section 32(1)

11. Section 32(1) provides a document is an exempt document 'if it is of such a nature that it would be privileged from production in legal proceedings on the ground of legal professional privilege or client legal privilege'.
12. A document will be subject to legal professional privilege and exempt under section 32(1) where it contains a confidential communication:¹
 - (a) between the client (or the client's agent) and the client's professional legal advisers, that was made for the dominant purpose of obtaining or providing legal advice or is referable to pending or contemplated litigation; or
 - (b) between the client's professional legal advisers and third parties, that was made for the dominant purpose of pending or contemplated litigation; or
 - (c) between the client (or the client's agent) and third parties that was made for the purpose of obtaining information to be submitted to the client's professional legal advisers for the dominant purpose of obtaining advice on pending or contemplated litigation.
13. Legal privilege exists to protect the confidentiality of communications between a lawyer and a client. Privilege will be lost where the client has acted in a way that is inconsistent with the maintenance of that confidentiality – for instance where the substance of the information has been disclosed with the client's express or implied consent.²
14. In relation to section 32(1), the Agency advised:

In the present case, the documents exempt under this provision would, if disclosed, disclose legal advice provided internally within the DHSV by its lawyers in circumstances where there is a relationship of client and legal adviser. That includes communications such as emails between the DHSV and its lawyers in the context of its lawyers providing legal advice.
15. My decision in relation to each document and section 32(1) is set out in **Annexure 1**.

¹ *Graze v Commissioner of State Revenue* [2013] VCAT 869 at [29]; *Elder v Worksafe Victoria* [2011] VCAT 1029 at [22]. See also *Evidence Act 2008* (Vic), section 119.

² Sections 122(2) and (3) of the *Evidence Act 2008* (Vic) (for CLP) or *Mann v Carnell* (1999) 201 CLR 1 at [28] (for LPP).

Section 33(1)

16. 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'.
17. 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 such information may be reasonably determined.⁴
18. The concept of 'unreasonable disclosure' involves balancing the public interest in the disclosure of official information with the interest in protecting an individual's personal privacy in the circumstances of a matter.
19. 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 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 this matter.
20. In deciding whether disclosure of a document would involve the unreasonable disclosure of a third party's personal affairs information, an agency must notify that person if an FOI request has been received for documents containing their personal information and seek their view as to whether disclosure of the document should occur.⁵ However, this obligation does not arise if:
- (a) the notification would be reasonably likely to endanger the life or physical safety of a person, or cause them undue distress, or is otherwise unreasonable in the circumstances;
 - (b) the notification would be reasonably likely to increase the risk to the safety of a person experiencing family violence; or
 - (c) it is not practicable to do so.⁶
21. In relation to section 33(1), the Agency advised it considered the following factors in its decision:
- the consultation process required by s 33 of the FOI Act;
 - the intention of the FOI Act to extend as far as possible the right of access to documents;
 - the balance sought to be drawn by Parliament in protecting the privacy of individuals other than the applicant;
 - the nature of the information;
 - the circumstances in which it was obtained and is held by DHSV;
 - the fact the individuals concerned may not wish to have their personal affairs information (as set out in s 33(9) of the FOI Act) disclosed under the Act and therefore potentially to the world at large;

³ Sections 33(1) and (2).

⁴ Section 33(9).

⁵ Section 33(2B).

⁶ Section 33(2C).

- the likelihood that disclosure may cause stress, anxiety or embarrassment to one or more individuals;
- [the applicant's] intended or expected use of the personal affairs information; and
- s 33(2A), even if irrelevant.

22. Having reviewed the documents, I am satisfied it is not unreasonable to release the personal affairs information of the Agency officers in these circumstances. Absent the Agency demonstrating special circumstances apply, I am of the view the personal affairs information is not sensitive as it relates solely to Agency officers in the context of them performing their professional duties and responsibilities and does not relate to matters concerning their personal or private lives. I consider disclosure in this instance, is not of a nature that would provide for arbitrary interference with the individual's privacy, family or home given the personal affairs information has arisen in the context of their professional employment and duties with the Agency. Therefore, I consider the public interest in transparency outweighs their personal privacy in this case.

23. This view is consistent with the Victorian Supreme Court of Appeal (**Court of Appeal**) decision of *Victoria Police v Marke*⁷ where the Court of Appeal held:

There is, of course, no absolute bar to providing access to documents which relate to the personal affairs of others. The exemption arises only in cases of unreasonable disclosure. What amounts to an unreasonable disclosure of someone's personal affairs will necessarily vary from case to case.⁸

24. The Agency consulted with certain third parties, where practicable. I have taken the results of that consultation in relation to each document set out below in **Annexure 1**.

Deletion of exempt or irrelevant information

25. 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.

26. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'⁹ and the effectiveness of the deletions. Where deletions would render a document meaningless, they are not 'practicable' and release of the document is not required under section 25.¹⁰

27. I have considered the effect of deleting exempt information from the documents, where relevant. I am satisfied it is not practicable to delete the exempt information in accordance with section 25, as to do so would render the documents meaningless.

28. My decision in relation to each document and section 25 is set out in **Annexure 1**.

Conclusion

29. On the information before me, I am not satisfied Document 1 is exempt under section 33(1). However, I am satisfied Document 2 (including all attachments) is exempt under section 32(1).

⁷ [2008] VSCA 218 in at [76].

⁸ Ibid.

⁹ *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].

¹⁰ *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].

30. As I am satisfied it is not practicable to delete exempt information from Document 2 in accordance with section 25, I have determined to exempt this Document in full.
31. Accordingly, it is not necessary for me to consider the application of sections 30(1) or 35(1)(b) to the same documents.

Review rights

32. 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.¹¹
33. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹²
34. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹³
35. 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.
36. 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.¹⁴

When this decision takes effect

37. I have decided to release documents that contain the personal affairs of a third party.
38. The relevant third party will be notified of my decision and is entitled to apply to VCAT for a review within 60 days from the date they are given notice.
39. 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.

¹¹ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

¹² Section 52(5).

¹³ Section 52(9).

¹⁴ 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]	Clinical supervision, revision and assessment of [the Applicant]	1	Refuse in part Section 33(1)	Release in full Section 33(1)	<p>Section 33(1): The name redacted in the document is a senior Agency officer and is personal affairs information.</p> <p>I have decided it would not be unreasonable to release this information:</p> <ul style="list-style-type: none"> • as set out above, I consider it is not unreasonable to release the names of Agency officers unless special circumstances apply; • in this case, in the context in which it appears (that of meeting regularly with the Applicant) it would be clear to the Applicant the name of the person concerned; and • I note the relevant third party objects to the release of their name. However, given it would already be known to the Applicant, and does not contain any sensitive personal information, I do not consider its disclosure is unreasonable. <p>Consequently, the document is not exempt under section 33(1).</p>
2.	[date]	Emails between the Agency and its legal	2	Refuse in full	Refuse in full	<p>Section 32(1): The document is an email from the Agency's legal adviser to the Agency, including forwarding an attached email from</p>

Annexure 1 – Schedule of Documents

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		adviser		Sections 30(1), 32(1)	Section 32(1)	<p>an investigator to the Agency's legal advisers.</p> <p>I note Document 2 demonstrates the Agency engaged [named legal service provider], who in turn engaged another third party to conduct the investigation subject to part of this request.</p> <p>Given the contents of the document I am satisfied that it is a confidential communication that was made for the dominant purpose of providing legal advice. Consequently, the document is exempt under section 32(1).</p>
<p>Documents 2.1 to 2.14 are attachments to the email in Document 2. As described above, Document 2 is an email from the Agency's legal adviser for the dominant purpose of providing legal advice.</p> <p>I must consider the attachments were provided by the legal adviser to the Agency for the purposes of providing legal advice in relation to the investigation. In these circumstances each of the attachments are exempt under section 32(1) as they form part of that confidential communication.</p> <p>Additional information relating to these documents is set out below, where required.</p>						
2.1	[month year]	Draft letter to a third party	2	<p>Refuse in full</p> <p>Sections 30(1), 32(1), 33(1)</p>	<p>Refuse in full</p> <p>Section 32(1)</p>	<p>Section 32(1): This letter is unsigned and is in draft form. As set out above, I have decided that it is a document that forms part of confidential legal advice provided to the Agency by its legal advisers and is therefore exempt under section 32(1).</p>

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Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
2.2	[date]	Record of interview with Applicant	33	<p>Refuse in full</p> <p>Sections 30(1), 32(1), 33(1)</p>	<p>Refuse in full</p> <p>Section 32(1)</p>	<p>Section 32(1): I note the Agency's submission that, [circumstances of this case]. The Agency also provided the third party's guide for participants that states interviewees will be provided with a copy of the transcript of interview.</p> <p>Given the context of this document, as an attachment to a confidential email sent by the Agency's legal adviser for the purposes of providing legal advice, I am satisfied the document is exempt under section 32(1). I note the Applicant may request a copy of this document from the Agency or the investigator outside the FOI Act.</p>
2.3	[date]	Record of interview with a third party	18	<p>Refuse in full</p> <p>Sections 30(1), 32(1), 35(1)(b)</p>	<p>Refuse in full</p> <p>Sections 32(1), 33(1)</p>	<p>Section 32(1): The document was provided to the Agency by its legal advisers for the purpose of providing legal advice. It is therefore exempt under section 32(1).</p> <p>Section 33(1): The document contains the personal affairs information of a person other than the applicant, being their name and responses to questions obtained by an investigator. I have decided it would be unreasonable to release this information:</p> <ul style="list-style-type: none"> • it is sensitive personal affairs information as it relates to both the professional and

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						<p>personal life of the person concerned;</p> <ul style="list-style-type: none"> it was provided to the Agency with the expectation of confidentiality; and I do not consider any public interest would be served by its disclosure.
2.4	[date]	Record of interview with a third party	12	<p>Refuse in full</p> <p>Sections 30(1), 32(1), 33(1), 35(1)(b)</p>	<p>Refuse in full</p> <p>Sections 32(1), 33(1)</p>	<p>Sections 32(1) and 33(1): See comments for Document 2.3 above.</p>
2.5	[date]	Record of interview with a third party	20	<p>Refuse in full</p> <p>Sections 30(1), 32(1), 33(1), 35(1)(b)</p>	<p>Refuse in full</p> <p>Sections 32(1), 33(1)</p>	<p>Sections 32(1) and 33(1): See comments for Document 2.3 above.</p>
2.6	[date]	Clinical supervision, revision and assessment of [the Applicant]		<p>Duplicate</p>	<p>Duplicate</p>	<p>This is a duplicate of Document 1.</p>
2.7	[date]	Letter from Applicant to the Agency and emails between Applicant and Agency	3	<p>Refuse in full</p> <p>Section 30(1), 32(1)</p>	<p>Not subject to review</p>	<p>The Applicant does not seek access to this document.</p>
2.8	[date]	Letter from Applicant	1	<p>Refuse in full</p>	<p>Not subject to review</p>	<p>The Applicant does not seek access to this</p>

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		to the Agency		Section 30(1), 32(1)		document.
2.9	[date]	Letter from Applicant to the Agency	14	Refuse in full Section 30(1), 32(1)	Not subject to review	The Applicant does not seek access to this document.
2.10	[date]	Draft letter to third party	1	Refuse in full Section 30(1), 32(1)	Refuse in full Section 32(1)	Section 32(1): I note this letter is unsigned and may be in draft form. As set out above, I have decided it is a document that forms part of confidential legal advice provided to the Agency by its legal advisers and is therefore exempt under section 32(1).
2.11	[date]	Letter to Applicant – outcome of peer professional review	2	Released in full	Not subject to review	
2.12	Undated	Clinical assessment and clinical mentoring: [the Applicant]	4	Refuse in full Sections 30(1), 32(1)	Refuse in full Section 32(1)	Section 32(1): See comments for Document 2.10 above.
2.13	[date]	Letter to Agency's legal advisers from third party	4	Refuse in full Sections 30(1), 32(1)	Refuse in full Section 32(1)	Section 32(1): See comments for Document 2.10 above.
2.14	[date]	Draft workplace investigation report	28	Refuse in full Sections 30(1), 32(1),	Refuse in full	Section 32(1): See comments for Document 2.10 above.

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				33(1), 35(1)(b)	Section 32(1)	