

Notice of Decision and Reasons for Decision

Applicant:	'BU6'
Agency:	Department of Health and Human Services
Decision date:	30 June 2020
Exemption considered:	Section 33(1)
Citation:	'BU6' and Department of Health and Human Services (<i>Freedom of Information</i>) [2020] VICmr 197 (30 June 2020)

FREEDOM OF INFORMATION – wardship record – documents affecting personal privacy

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.

I am satisfied the documents are exempt under section 33(1).

As I am satisfied it is practicable to provide the Applicant with an edited copy of the documents in accordance with section 25, I have determined to grant access to the documents in part.

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner

30 June 2020

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency for access to their full wardship record.
2. In its decision, the Agency identified eight documents, comprising of 59 pages, falling within the terms of the Applicant's request. It granted access to 49 pages in full and 10 pages in part.
3. The Agency relied on the exemption under section 33(1) to refuse access to the documents in part. The Agency's decision letter sets out the reasons for its decision.

Review

4. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
5. In their application for review, the Applicant states they seek access to the records to assist them in recalling their childhood.
6. I have examined copies of the documents subject to review.
7. I note the documents came into existence more than five years prior to the commencement of the FOI Act.
8. Section 67 provides:

67 Retrospective operation of law

- (1) An applicant for access to records about himself, within the meaning of section 33, shall be entitled to receive access subject to this Act to any such record notwithstanding that the record came into existence at any time prior to the date of commencement of this section.
 - (2) An applicant for access to a document other than those referred to in subsection (1) shall be entitled to receive access, subject to this Act, to any such document provided that it came into existence not more than five years prior to the date of commencement of this section.
9. The documents contain the Applicant's personal affairs information within the meaning of section 33. As such, I am of the view the documents are subject to access under the FOI Act.
 10. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
 11. I have considered all communications received from the parties, including:
 - (a) the Agency's decision on the FOI request;
 - (b) the Applicant's submission dated [date] and information provided with the Applicant's review application;
 - (c) the Agency's submission dated [date]; and
 - (d) all communications between OVIC and the Agency and Applicant.
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12. 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.

Agency's submission

13. In relation to the application of section 33(1), the Agency provided the following submission:

The exempt information pertains to the personal affairs of [the Applicant's] parents, siblings and other third parties. This information is strictly the personal affairs of the persons named in the documents and is highly sensitive. The department holds a duty to protect the personal privacy of these individuals.

...

Considering the highly sensitive nature of the exempt information, the circumstances in which the department came to pose it, and the anxiety, stress and embarrassment it would likely cause to third parties if released, the department has given more weight to its duty to protect the private personal affairs information of third parties (especially those involved in child protection matters) and determined it is unreasonable to release this information to the Applicant.

Review of exemptions

Section 33(1) – personal affairs information of third parties

14. 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'.

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

15. 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.²
16. 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.³
17. The information in the documents relates to the Applicant's family history and other personal information of individuals other than the Applicant recorded by the Agency during the Agency's involvement with the Applicant and their family. Such information includes names, dates of birth, details concerning the behaviour, health and personal circumstances and history of third parties, and other information capable of identifying persons other than the Applicant.
18. I am satisfied information in the documents exempted by the Agency relates to individuals other than the Applicant, as it identifies those individuals and details about them.
19. In deciding whether the exemption under section 33(1) applies, it is also necessary to determine whether disclosure of the personal affairs information in the documents would be unreasonable.

¹ Sections 33(1) and (2).

² Section 33(9).

³ *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].

Would disclosure of the personal affairs information be unreasonable in the circumstances?

20. The concept of 'unreasonable disclosure' involves balancing the public interest in the disclosure of official information with the protection of a person's right to privacy in the circumstances.
21. In *Victoria Police v Marke*,⁴ the Victorian Court of Appeal held there is 'no absolute bar to providing access to documents which relate to the personal affairs of others'. Further, 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'.
22. In determining whether disclosure of the personal affairs information would be unreasonable, I have considered the following factors:

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

The documents comprise [location] Register Entries (the **[location] Registers**) and the Applicant's wardship file. As described above, the information exempted by the Agency relates to persons other than the Applicant, such as relatives and other third parties.

The information concerning the Applicant's siblings and other children, who are not related to the Applicant, was recorded at or around the same time as the Applicant's details were recorded in the documents. While the Applicant's information is intertwined with the personal affairs information of third parties, I am satisfied the information exempted by the Agency concerns the personal circumstances and history of third parties other than the Applicant.

Given the content of the information in the documents and the context in which it was recorded, I am of the view it is personal to the third parties and given it is recorded in documents of this nature, is sensitive and confidential.

Further, I consider the sensitivity of the information has not diminished over the passage of time in which the documents were created, being nearly 50 years ago.

On balance, I consider this factor weighs against disclosure of the personal affairs information of third parties other than the Applicant.

(b) The extent to which the information is available to the public

The information sought is not publicly available.

(c) The likelihood of further disclosure of information, if released

I have considered the likelihood of the personal affairs information in the documents being further disseminated by the Applicant and the effects broader disclosure of this information would have on the personal privacy of the relevant third parties.

I consider it likely the third parties would not want this information in the public domain or disclosed to other persons without their consent.

The nature of disclosure under the FOI Act is unconditional and unrestricted, which means an applicant is free to disseminate widely or to use a document as they choose.⁵ As such, no conditions or restrictions can be placed on a document released under the FOI Act.

⁴ [2008] VSCA 218 at [76].

⁵ *Victoria Police v Marke* [2008] VSCA 218 at [68].

While there is no specific information before me to suggest the documents would be further disseminated by the Applicant, given the sensitive and personal nature of the documents, on balance, I consider this factor weighs against disclosure.

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

I acknowledge the Applicant's personal interest in seeking information relating to their family and their childhood.

In addition, I consider there is a strong public interest in persons, who are sometimes referred to as 'Forgotten Australians',⁶ who as children were placed in or taken into State care, having access to documents and information that provides more detail as to why and how decisions were made regarding their welfare as children.

Numerous public inquiries mean it is difficult to dispute these decisions resulted in those directly and indirectly affected experiencing profound and ongoing impacts.

Relevantly, the Victorian Ombudsman observed in an investigation report:

The issues faced by former wards have been the subject of a number of state and Commonwealth reviews and reports since 1997.¹ This has led to an increased public awareness of the neglect, abuse and lack of care experienced by many children in institutions, as well as the resulting challenges facing former wards and their families today. Increasing numbers of former wards are seeking access to records relating to their time spent in care as a way to understand their past. Records are also important for gaining access to medical history, for reconnecting with lost family or for substantiating a criminal prosecution or claim for compensation when harm has been caused.⁷

For these reasons, I consider there is a public interest that would be promoted by release of the personal affairs information of the third parties in this instance. However, in the context of seeking access to sensitive historical records under the FOI Act, which in this case relate to not only the Applicant, but also to third parties, I must balance the public interest in protecting the personal privacy of those third parties.

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

In its submission, the Agency states:

...the department has not consulted with the individuals whose information has been exempted under section 33(1). The primary reason for this is that it was considered unreasonable due to the likelihood of causing such third parties undue suffering, distress and anxiety in notifying them that their personal information is contained in the personal file of a family member.

Despite the impracticability or unreasonableness of consulting with the individuals concerned, given the highly personal and sensitive nature of the information exempt in the documents, the department nonetheless considers it highly unlikely that the individuals would want their personal information disclosed without their consent.

I am satisfied it was not practicable for the Agency to consult with the relevant third parties, having regard to the circumstances in which the documents were created and the passage of time.

⁶ See Senate Community Affairs References Committee (2004), *Forgotten Australians: A report on Australians who experienced institutional or out-of-home care as children*, Canberra: Commonwealth of Australia.

⁷ Brouwer, G E, *Own motion investigation into the management and storage of ward records by the Department of Human Services*, [2012] VicOmbPRp 1 (1 March 2012) at [19]-[20]. Accessible at <<http://www7.austlii.edu.au/au/other/VicOmbPRp/2012/1.html>>.

In the absence of written consent provided by the relevant third parties, whose personal affairs information was exempted by the Agency in the documents, I consider it would be reasonably likely those third parties would object to the release of their information. Particularly, as the information relates to their personal circumstances and history of involvement with State child protection services.

- (f) 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.⁸

I consider the Applicant has a genuine interest in obtaining a more complete understanding of their wardship records and childhood.

However, given the nature of the information and the circumstances in which the documents were created, I consider it would be unreasonable to release personal affairs information of third parties to the Applicant, particularly, as its release would not serve the Applicant's understanding of their own personal history.

- (g) Whether disclosure of information would, or would be reasonably likely to endanger the life or physical safety of any person⁹

I do not consider this is a relevant factor in this case.

23. In weighing up the above considerations, I am satisfied the interest in protecting the personal privacy of the third parties, in the absence of their consent to the release of their personal affairs information to the Applicant under the FOI Act, outweighs the Applicant's interest in obtaining access to the documents in full.
24. Accordingly, I am satisfied disclosure of the personal affairs information in the documents is unreasonable in the circumstances and the documents are exempt under section 33(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 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'¹⁰ 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 25.¹¹
27. I have considered the effect of deleting exempt information from the documents in accordance with section 25. I am satisfied it is practicable to delete exempt information from certain documents, as to do so would not require substantial time and effort, and the edited documents would retain meaning.

⁸ *Victoria Police v Marke* [2008] VSCA 218 at [104].

⁹ Section 33(2A).

¹⁰ *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].

¹¹ *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

28. On the information before me, I am satisfied the documents are exempt under section 33(1).
29. As I am satisfied it is practicable to provide the Applicant with an edited copy of the documents with exempt and irrelevant information deleted in accordance with section 25, I have determined to grant access to the documents in part.

Review rights

30. 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.¹²
31. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹³
32. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹⁴
33. 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.
34. 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.¹⁵
35. If a review application is made to VCAT, my decision will be subject to any VCAT determination.

¹² The Applicant in section 50(1)(b) and the Agency in section 50(3D).

¹³ Section 52(5).

¹⁴ Section 52(9).

¹⁵ Sections 50(3F) and (3FA).