

## Notice of Decision and Reasons for Decision

---

Applicant:	'BS3'
Agency:	Monash University
Decision date:	26 June 2020
Provision and exemption considered:	Sections 25A(5), 33(1)
Citation:	'BS3' and Monash University ( <i>Freedom of Information</i> ) [2020] VICmr 175 (26 June 2020)

---

FREEDOM OF INFORMATION – personal affairs information – third party education records – 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).

My reasons for decision follow.

**Joanne Kummrow**  
Public Access Deputy Commissioner

26 June 2020

## Reasons for Decision

### Background to review

1. The Applicant made a request to the Agency for access to the following documents:
  - ...a copy of the formal [specified] letter and/or a copy of the [education level description] certificate for [specified person], Monash University [specified research area].
  - ...a copy of the submitted [education level description] thesis by [specified person].
2. The Applicant's request states they seek access to complete copies of documents only.
3. In its decision, the Agency relied upon section 25A(5) to refuse to grant access to documents in the first part of the request without having identified any documents on grounds all documents to which the request relates would be exempt under section 33(1).
4. In relation to the second part of the request, the Agency decided the document is available to the public in the Agency's library and is not subject to access under the FOI Act.
5. The Agency's decision letter of [date] sets out the reasons for its decision.

### Review

6. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision.
7. The Applicant advised they do not seek a review of Agency's decision in relation to the second part of the request, being the [education level description] thesis. Accordingly, this review relates to the Agency's decision in relation to the first part of the Applicant's request only.
8. I have not examined copies of the documents subject to review.
9. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
10. I have considered all communications and submissions received from the parties, including:
  - (a) the Applicant's FOI request;
  - (b) the Agency's decision on the FOI request;
  - (c) the Applicant's submissions dated [date] and [date], and information provided with the Applicant's review application;
  - (d) the Agency's submission dated [date]; and
  - (e) correspondence between OVIC staff, the Applicant and Agency.
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. Section 25A(5) provides an agency may refuse an FOI request without identifying any or all documents relevant to the request, or to specify any relevant exemption under which a document would be exempt, if:
  - (a) it is apparent from the terms of the request, all documents sought would be exempt under the FOI Act;
  - (b) the applicant agrees to receive an edited copy of the documents with exempt information deleted; and
  - (c) there is no obligation for the agency to provide the applicant with an edited copy of any document with exempt information deleted under section 25.
13. The power to refuse an FOI request under section 25A(5) is 'carefully circumscribed'.<sup>1</sup>
14. Therefore, I must be satisfied of the following requirements, which operate to limit its application, are met:
  - (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 with exempt or irrelevant information deleted; or
    - (ii) the applicant's request, or through consultation with the applicant that they do not seek access to an edited copy of a document<sup>2</sup> (**third limb**).
15. Section 25A(5) does not require an agency to identify any or all documents to which a request relates or to specify, in respect of each document, the relevant exemption under which a document is claimed to be exempt.
16. Accordingly, I have made my decision without having reviewed any of the requested documents, and in the absence of confirming whether any relevant documents exist, or may exist.

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

17. I am satisfied the nature or character of the requested documents, as described by the Applicant, is apparent from the terms of their request, being documents concerning a third party individual's education records.
18. I am also satisfied the nature of the requested documents is objectively apparent from the specific terms of the Applicant's request.
19. Accordingly, I am satisfied the first limb of section 25A(5) is met.

---

<sup>1</sup> *Knight v Corrections Victoria* [2010] VSC 338 at [37].

<sup>2</sup> *Knight v Corrections Victoria* [2010] VSC 338.

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

20. In refusing access to the requested documents under section 25A(5), the Agency determined the requested documents would be exempt under section 33(1).

21. The Agency states in its decision letter:

...without having identified all of the documents sought ...it is apparent from the nature of the documents described in the request that all of the documents sought by you are exempt documents under s 33(1) of the FOI Act. ... Section 33(1) provides that a document is an exempt document if, relevantly, its disclosure would, involve the unreasonable disclosure of information relating to the personal affairs of any person. In the present case, I have deemed part 1 of your request an unreasonable disclosure of the personal affairs of [specified person].

***Section 33(1) – Documents containing personal affairs information***

22. 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;<sup>3</sup> and
- (b) such disclosure would be ‘unreasonable’ in the circumstances.

23. 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.<sup>4</sup>

24. Personal affairs information that relates to an individual ‘concerns or affects that person as an individual’.<sup>5</sup>

25. 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.<sup>6</sup>

**Would the requested documents contain personal affairs information?**

26. Based on the terms of the Applicant’s request, I am satisfied the nature of the requested documents, would contain the personal affairs information of a third party.

**Would release of the personal affairs information be unreasonable in the circumstances?**

27. The concept of ‘unreasonable disclosure’ involves determining whether the public interest in disclosure of official information is outweighed by the interest in protecting a person’s right to privacy in the circumstances.

28. In *Victoria Police v Marke*,<sup>7</sup> 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’.

---

<sup>3</sup> Sections 33(1) and (2).

<sup>4</sup> Section 33(9).

<sup>5</sup> *Hanson v Department of Education & Training* [2007] VCAT 123.

<sup>6</sup> *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].

<sup>7</sup> [2008] VSCA 218 at [76].

29. 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'.<sup>8</sup>
30. I accept the Applicant is aware of the identity of the relevant third party in this matter. However, the release of personal affairs information may still be unreasonable even where the identity of a third party is known to an applicant.<sup>9</sup>
31. I note the Agency's submission states:
- ... disclosure of the personal affairs information would be unreasonable having regard to the relationship between the Applicant, the University and the [specified person] who is the subject of the request, including [details redacted]. This gives rise to concerns about the effect of disclosure that satisfy the criteria under s 33(2A), and more broadly, the unreasonableness of disclosure under s 33(1).
32. I have considered the following factors in determining whether disclosure of the personal affairs information of the relevant third party would be reasonable in the circumstances:
- (a) the nature of the personal affairs information and the circumstances in which the information was obtained by the Agency;
  - (b) the Applicant's interest in the information and whether their purpose for seeking the information is likely to be achieved;
  - (c) the likelihood of further disclosure of the information by the Applicant if it is released;
  - (d) whether any public interest would be promoted by release of the information;
  - (e) whether the individual to whom the information relates would be likely to object to its release; and
  - (f) whether the disclosure of the information would, or would be reasonably likely to, endanger the life or physical safety of any person.<sup>10</sup>
33. Having considered the above factors and submissions made by the Applicant and the Agency, I am satisfied disclosure of the requested documents would be unreasonable for the following reasons:
- (a) I consider any documents that fall within the scope of the first part of the Applicant's request would disclose the personal affairs information of a third party. For example, the requested documents would contain information obtained and recorded by the Agency in relation to that person's education.
  - (b) In the particular circumstances of this matter, I am satisfied the relevant third party would be reasonably likely to object to the release of their personal affairs information in the documents under the FOI Act to the Applicant.
  - (c) Further, I consider disclosure of the documents sought by the Applicant concerning the relevant third party under an FOI request, given 'the relationship between the Applicant, the

---

<sup>8</sup> [2008] VSCA 218 at [79].

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

<sup>10</sup> Section 33(2A) is a mandatory factor that must be considered when considering whether disclosure of personal affairs information would be unreasonable.

University and the [specified person] who is the subject of the request', would be reasonably likely to cause the third party stress and anxiety.

- (d) In its decision, the Agency included a search result from a publicly available Agency database in order to assist the Applicant in obtaining the information sought. However, the Applicant submitted they want to verify the existence and date of the documents. While the Applicant's personal interest in obtaining access to the documents subject to review is acknowledged, I consider it is a matter of private interest only.
- (e) As such, there is no information before me to demonstrate the public interest would be promoted by disclosure of the third party's personal affairs information in the documents.
- (f) Finally, I have considered whether disclosure of the information would, or would be reasonably likely to, endanger the life or physical safety of any person. On the information before me, I am satisfied this factor is a relevant consideration in this matter.
- (g) On balance, I am satisfied the need to protect the personal affairs information of the relevant third party in this matter outweighs the Applicant's personal interest in obtaining the requested documents.

34. Accordingly, I am satisfied release of the third party's personal affairs information would be unreasonable in the circumstances the second limb of section 25A(5) is met.

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

- 35. 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.
- 36. In this case, the Applicant is clear they seek access to the requested documents in full without any exempt information deleted in accordance with section 25.
- 37. Therefore, I am satisfied there is no scope to provide an edited copy of the requested documents to the Applicant.
- 38. Accordingly, I satisfied the third limb of section 25A(5) is met.

***Conclusion***

- 39. 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 as the Applicant seeks access to the documents in full; 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.
- 40. Accordingly, I have determined to refuse to grant access to the requested documents in accordance with the Applicant's request under section 25A(5).

## Review rights

41. 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.<sup>11</sup>
42. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.<sup>12</sup>
43. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.<sup>13</sup>
44. Information about how to apply to VCAT is available online at [www.vcat.vic.gov.au](http://www.vcat.vic.gov.au). Alternatively, VCAT may be contacted by email at [admin@vcat.vic.gov.au](mailto:admin@vcat.vic.gov.au) or by telephone on 1300 018 228.
45. 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.<sup>14</sup>
46. If a review application is made to VCAT, my decision will be subject to any VCAT determination.

---

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

<sup>12</sup> Section 52(5).

<sup>13</sup> Section 52(9).

<sup>14</sup> Sections 50(3F) and (3FA).