

Notice of Decision and Reasons for Decision

Applicant:	'BV3'
Agency:	Department of Health and Human Services
Decision date:	22 July 2020
Provision and exemption considered:	Sections 25A(5), 33(1)
Citation:	'BV3' and Department of Health and Human Services (<i>Freedom of Information</i>) [2020] VICmr 204 (22 July 2020)

FREEDOM OF INFORMATION – personal affairs information – third party sensitive health information – refusal to process request on grounds all documents would be exempt – COVID-19

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.

Sven Bluemmel
Information Commissioner

22 July 2020

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency for access to certain documents. Following consultation with the Agency, the Applicant clarified the initial request.
2. The clarified request was for access to the following documents:

...a file of data that provides the specific details for each Covid case recorded in Victoria (to-date approximately 1,600 cases).

The data requested for each case is simply:

Case # - Persons Age - Date added as a New case - Test Type (PCR or Serology) and Test Date - Cause (Cluster or O/seas or Community transmission) - Date Recovery recorded - Location (LGA or Interstate or Overseas)

eg. 1 - [Age] yrs - [Date] - PCR [Date] - Overseas traveller - [Date] – [location]

123 – [Age] yrs - [Date] - PCR [Date] - [Cluster] - [Date] – [location]

1,600 - [Age] yrs - [Date] - PCR [Date] - Community transmission - [status] - [location]
3. The Agency determined any documents falling within the terms of the Applicant's request would be exempt from release under sections 33(1) and 31(1)(a). 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

4. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
5. I have not 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 or submissions received from the parties, including:
 - (a) the Agency's decision on the FOI request;
 - (b) the information provided with the Applicant's review application;
 - (c) the Agency's submission dated [date]; and
 - (d) all correspondence between OVIC staff, the Applicant and Agency during the review.
8. During the course of the review, the Agency submitted that it no longer seeks to rely on section 31(1)(a), which will therefore not be considered as part of the review.
9. 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

10. 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; and
 - (b) either it is apparent that 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, or it is apparent that the applicant would not wish to have access to an edited copy of the document.
11. The power to refuse an FOI request under section 25A(5) is 'carefully circumscribed'.¹
12. 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 document² (**third limb**).
13. 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.
14. 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?

15. 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 potentially sensitive health and personal affairs information of third party individuals other than the Applicant.
16. I am also 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?

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

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

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

18. In its decision letter, the Agency states:

...Given the categories of data you have requested, any documents that meet the terms of your request would contain the sensitive health and personal information of people other than yourself; the combination of which would be likely to be identifying. Consequently, any relevant documents would be obviously exempt under this section of the Act.

Section 33(1) – Documents containing personal affairs information

19. 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’ in the circumstances.

20. 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

21. Personal affairs information that relates to an individual ‘concerns or affects that person as an individual’.⁵

22. 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?

23. The Applicant has not asked for information such as name or address that would expressly identify any individual. However, given the relatively small number of individuals involved, the additional contextual information sought by the Applicant such as date, cluster information and location information (such as LGA), I consider that the identity of those individuals could be reasonably ascertained.

24. Based on the terms of the Applicant’s request, I am satisfied the nature of the requested documents would contain the health and personal affairs information of third parties.

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

25. 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.

26. 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’.

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].

27. 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
28. The release of personal affairs information may still be unreasonable even where the identity of a third party is known to an applicant.⁹
29. 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;
 - (f) whether release of the information could lead the persons to whom it related suffering stress and anxiety; and
 - (g) whether the disclosure of the information would, or would be reasonably likely to, endanger the life or physical safety of any person.¹⁰
30. Having considered the above factors, 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 sensitive health and personal affairs information of third parties.
 - (b) In the particular circumstances of this matter, I am satisfied relevant third parties would be reasonably likely to object to the release of their sensitive health and 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 parties under an FOI request, given the circumstances under which it was collected would be reasonably likely to cause the third parties stress and anxiety.
 - (d) The Agency submitted that it advised the Applicant of publicly available data that can be accessed in order to assist the Applicant. In the circumstances, the Applicant's personal interest in obtaining access to the documents subject to review is acknowledged, however I consider it is a matter of private interest only given the circumstances where suitably de-identified data is already available in the public domain.

⁸ [2008] VSCA 218 at [79].

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

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

- (e) As such, there is no information before me to demonstrate the public interest would be promoted by disclosure of further sensitive health and personal affairs information of third parties 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. There is no information before me to suggest this is a relevant factor in this case.
- (g) On balance, I am satisfied the need to protect the sensitive health and personal affairs information of the relevant third parties in this matter outweighs the Applicant's personal interest in obtaining the requested documents.

31. Accordingly, I am satisfied release of the third party's personal affairs information would be unreasonable and exempt under section 33(1), and in the circumstances the second limb of section 25A(5) is met.

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

32. 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.

33. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'¹¹ 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 25.¹²

34. 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.

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

Conclusion

36. 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.

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

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

¹¹ *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].

¹² *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].

Review rights

39. 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.¹³
40. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹⁴
41. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹⁵
42. 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.
43. 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.¹⁶
44. If a review application is made to VCAT, my decision will be subject to any VCAT determination.

¹³ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

¹⁴ Section 52(5).

¹⁵ Section 52(9).

¹⁶ Sections 50(3F) and (3FA).