

Notice of Decision and Reasons for Decision

Applicant:	'CG1'
Agency:	Racing Victoria Limited
Decision Date:	28 October 2020
Exemptions considered:	Sections 35(1)(b), 33(1)
Citation:	'CG1' and Racing Victoria Limited (<i>Freedom of Information</i>) [2020] VICmr 304 (28 October 2020)

FREEDOM OF INFORMATION – personal betting history – wagering service provider – information provided in confidence – personal affairs information – disclosure unreasonable

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 a document requested by the Applicant under the FOI Act.

I am satisfied the document is exempt in full under section 33(1).

However, I am not satisfied the document is exempt under section 35(1)(b).

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner

28 October 2020

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency for access to the following documents:

It relates to charges in [date] of [number of] lay bets by [named person]

I would request the amounts of the bets and the horses and races of the lay bets. I presume these lay bets were with [a named business undertaking].
2. In its decision, the Agency identified a document falling within the terms of the Applicant's request. The Agency determined the document was exempt under sections 35(1)(b) and 33(1) and refused access to the document in full. The Agency's decision letter 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 to refuse access.
4. I have examined a copy of the document subject to review.
5. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
6. I have considered all communications and submissions received from the 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.
8. I note Parliament's intention the FOI Act must be interpreted so as to further the object of the Act and any discretions conferred by the Act must be exercised, as far as possible, so as to facilitate and promote the disclosure of information in a timely manner and at the lowest reasonable cost.

Review of exemptions

Section 35(1)(b)

9. A document is exempt under section 35(1)(b) if two conditions are satisfied:
 - (a) disclosure would divulge information or matter communicated in confidence by or on behalf of a person or a government to an agency or a Minister; and
 - (b) disclosure would be contrary to the public interest as it would be reasonably likely to impair the ability of an agency or a Minister to obtain similar information in the future.
10. 'Person' includes 'a body politic or corporate as well as an individual'.¹
11. When determining whether information was communicated in confidence, it is necessary to consider the position from the perspective of the communicator.² Further, confidentiality can be expressed or implied from the circumstances of the matter.³

¹ Section 38 of the *Interpretation of Legislation Act 1984* (Vic).

Was the information communicated in confidence?

12. The document subject to review contains a third party individual's betting transaction history with an approved wagering service provider ([named business undertaking]).
13. The Agency consulted with [the named business undertaking] to obtain its views as to whether it communicated information in the document in confidence.⁴ [The named business undertaking] advised it communicated the information to the Agency in confidence and objected to its release under the FOI Act.
14. Having considered the Agency's submission regarding the context in which the information was provided, I am satisfied the information was communicated by [the named business undertaking] to the Agency in confidence.

Would disclosure of the information be contrary to the public interest as it would reasonably be likely to impair the ability of the Agency to obtain similar information in the future?

15. The second requirement under section 35(1)(b) requires me to consider whether the Agency would be impaired from obtaining similar information in the future if the confidential information in the document is disclosed under the FOI Act. This means, I must be satisfied others in the position of the communicator would be reasonably likely not to provide similar information to the Agency in the future.
16. The Agency submits:

...if [the Agency] cannot assure the confidentiality of personal betting information, then wagering services providers will be less likely to cooperate and share their data with Racing Victoria. This will significantly undermine [the Agency's] compliance assurance functions and its ability to enforce the Rules and safeguard the integrity of thoroughbred racing in Victoria; and

... when consulted, [the named business undertaking] confirmed that the information was communicated in confidence, strictly for the purpose of the [description of] investigation. In the event that Racing Victoria was required to disclose their customer's personal betting information for other purposes (e.g. if this information was generally available to be accessed by the public under FOI), this would deter [the named business undertaking] from co-operating and providing such information to [the Agency] in future as they would not be able to guarantee to their customer's that their personal information is protected and provided in confidence. In turn, without the guarantee of confidentiality, customers would cease to engage with [the named business undertaking].
17. As the principal racing authority and controlling body of thoroughbred racing in Victoria, the Agency is responsible for investigating breaches of and enforcing the Rules of Racing and safeguarding the integrity of the Victorian racing industry.
18. As part of this role, the Agency may determine and grant approval for a wagering service provider to publish and use Victorian thoroughbred race fields in accordance with the *Gambling Regulation Act 2003* (Vic) (**Gambling Regulation Act**), subject to any conditions the Agency thinks fit.⁵
19. [The named business undertaking] is an approved wagering service provider and is subject to standard conditions including the following which the Agency provided in their submission:

² *XYZ v Victoria Police (General)* [2010] VCAT 255 at [265].

³ *Ibid.*

⁴ Section 35(1A).

⁵ Section 4.2.3 *Gambling Regulation Act 2003* (Vic). See *Publication and Use of Victorian Thoroughbred Race Fields: Standard Conditions of Approval* (Effective from 1 July 2019) at <<https://cdn.racing.com/-/media/rv/2019-rv/wagering/files/2019-2020/appendix-c---standard-conditions---effective-1-july-2019-clean-version.pdf?la=en>>.

The Standard Conditions provide that a Wagering Service Provider must co-operate with investigations where requested by Racing Victoria. This includes through the provision of betting information to assist in the investigation of breaches of the Rules.

20. I accept there is a public interest in the Agency being able to carry out its functions in relation to which it relies on receiving information from an approved wagering service provider when monitoring or investigating compliance and integrity issues.
21. However, having carefully considered the Agency's submissions, I am of the view, if requested by the Agency, [the named business undertaking] is obliged to share betting information as part of its agreement under the Gambling Regulation Act and the standard conditions. As such, I am not satisfied disclosure of the confidential information would result in [the named business undertaking], or another approved wagering service provider, withholding similar information from the Agency in the future, as to do so would breach the standard conditions of its approval as a wagering service provider.
22. Therefore, I am satisfied disclosure of the document would not be contrary to the public interest as disclosure would not impair the ability of the Agency to obtain similar information in the future.
23. Accordingly, I am not satisfied the document is exempt under section 35(1)(b).

Section 33(1)

24. 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 the 'personal affairs' of a person other than the Applicant; and
 - (b) such disclosure would be 'unreasonable'
25. 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.⁶

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

26. As noted above, the document contains the personal betting transaction history of an individual.
27. The scope of what constitutes 'personal affairs information' is broad and includes matters relating to health, private behaviour, home life or personal or family relationships of individuals.⁷
28. I am satisfied the document relates to the personal affairs information of a person other than the Applicant.

Would disclosure of the personal affairs information be contrary to the public interest?

29. 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.⁸
30. The proper application of section 33(1) involves consideration of 'all matters relevant, logical and probative to the existence of conditions upon which the section is made to depend'.⁹

⁶ Section 33(9).

⁷ *Re F and Health Department* (1988) 2 VAR 458 as quoted in *RFJ v Victoria Police FOI Division* [2013] VCAT 1267 at [103].

⁸ *Re Page v Metropolitan Transit Authority* (1988) 2 VAR 243 at 245-6.

⁹ [2008] VSCA 218 at [104].

31. In determining whether disclosure of the personal affairs information is unreasonable in the particular circumstances of this matter, I have considered the following factors:

(a) The nature of the personal affairs information

The nature of the personal affairs information is sensitive given it relates to the personal, financial affairs of a third party other than the Applicant. Further, the information is especially sensitive when considering it was provided to the Agency as part of an investigation.

(b) The circumstances in which information was obtained by the Agency

As stated above, the information was obtained by the Agency in carrying out its regulatory and compliance functions as the thoroughbred racing authority in Victoria.

(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.¹⁰

The Applicant states the information will assist them in bringing the truth to light regarding an investigation conducted by the Agency. The Applicant has not provided any further information regarding their purpose for seeking access to the requested information.

On the information before me and other publicly available information, I do not consider the release of the personal affairs information would assist the Applicant to achieve their stated purpose for seeking access to the information.

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

While I acknowledge the Applicant's personal interest in seeking access to the information, there is no information before me to suggest any broader public interest would be promoted by the release of the personal affairs information of the third party given the circumstances outlined above.

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

There is no information before me concerning the views of the third party as to the release of their personal affairs information. Having considered the nature of the information and the purpose for which it was obtained, I consider it is reasonably likely the third party would not expect their personal affairs information would be disclosed under the FOI Act and would be unlikely to consent to the release of their personal affairs information in the document.

(f) The likelihood of further disclosure of the information if released

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

The nature of disclosure under the FOI Act is unconditional and unrestricted. This means an applicant is free to disseminate widely or use a document as they choose once a document is released.¹¹

Accordingly, I have considered the likelihood the personal affairs information in the document would be further disseminated and the effects its broader disclosure would have on the privacy of the third party individual.

Having considered the content of the Applicant's submission, I consider it is reasonably likely the Applicant would publicly disseminate the document.

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

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 consider whether 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 is a relevant factor in this matter.¹²

32. Having weighed up the above factors, on balance, I am satisfied disclosure of the personal affairs information in the document would be unreasonable in the circumstances, and the document is exempt under section 33(1).

Deletion of exempt or irrelevant information

33. 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.
34. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'¹³ 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 25.¹⁴
35. I have considered whether it is practicable to provide the Applicant with an edited copy of the document with the exempt information deleted in accordance with section 25. I am satisfied it is not practicable to delete the exempt information, as to do so would render the document meaningless.

Conclusion

36. On the information before me, I am satisfied the document is exempt in full under section 33(1).
37. However, I am not satisfied the document is exempt under section 35(1)(b).

Review rights

38. If the Applicant 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.¹⁵

¹¹ *Victoria Police v Marke* [2008] VSCA 218 at [68].

¹² Section 33(2A).

¹³ *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].

¹⁴ *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].

¹⁵ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

39. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹⁶
40. 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.
41. 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

¹⁶ Section 52(5).

¹⁷ Sections 50(3F) and (3FA).