

Notice of Decision and Reasons for Decision

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| Applicant: | 'BS7' |
| Agency: | Victorian WorkCover Authority |
| Decision date: | 29 June 2020 |
| Exemption considered: | Section 33(1) |
| Citation: | 'BS7' and Victorian WorkCover Authority (<i>Freedom of Information</i>) [2020] VICmr 180 (29 June 2020) |

FREEDOM OF INFORMATION – WorkSafe records – 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 fresh decision to refuse access to a document 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 document is exempt under section 33(1).

As I am not satisfied it is practicable to delete the exempt information from the document in accordance with section 25, I have determined to exempt the document in full.

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner

29 June 2020

Reasons for Decision

Background to review

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

Names of the [number of professional role description that the] [Agency] took action against in [specified years] following [a specified] investigation [and report].
2. The Agency relied on the exemption in section 33(1) to refuse 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 note the Applicant's request is for the names of [description of professional role] referred to in [the specified report] published in [specified month and year] (**[specified] Report**).
5. I have examined a copy of the document which is 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) information provided with the Applicant's review application;
 - (c) the Agency's submission dated [date]; and
 - (d) [content of the specified] Report.
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

Section 33(1)

9. 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'.

Does the document contain the 'personal affairs information' of individuals other than the Applicant?

¹ Sections 33(1) and (2).

10. 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 this may be reasonably determined.² It has also been held information relates to a person's personal affairs if it 'concerns or affects that person as an individual'.³
11. A document will disclose personal affairs information if the document is capable of, either directly or indirectly, identifying a particular individual whose personal affairs are disclosed. 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.⁴
12. The document contains a list of [specified number of] third party names. I am satisfied the information exempted by the Agency in the document amounts to 'personal affairs information' for the purposes of section 33(1). In the context of this review and the [specified] Report, I consider the information to be sensitive in nature.

Would release of the personal affairs information be unreasonable?

13. 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.
14. In determining whether disclosure of the personal affairs information in the document is unreasonable in this matter, I have considered the following factors:
 - (a) the nature of the personal affairs information, for example, whether it is sensitive or is of current relevance, particularly combined with other information available in the public domain;
 - (b) the circumstances in which the information was obtained by the Agency;
 - (c) the Applicant's interest in the information, including their purpose or motive for seeking access to the document;
 - (d) whether any public interest would be promoted by disclosure;
 - (e) the likelihood of further disclosure of the information if it is released under the FOI Act;
 - (f) whether the individuals to whom the information relates object or would be reasonably likely to object to disclosure of the information;
 - (g) whether disclosure would cause the individuals undue stress or anxiety; and
 - (h) whether the disclosure of the information would, or would be reasonably likely to, endanger the life or physical safety of any person.
15. 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 an FOI request has been received for documents containing their personal information and seek their views on disclosure of the document.⁵ However, this obligation does not arise if:

² Section 33(9).

³ *Hanson v Department of Education and Training* [2007] VCAT 123 at [9].

⁴ *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].

⁵ Section 33(2B).

- (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
16. The Agency did not consult with the relevant third parties, as it determined notifying those individuals would be reasonably likely to cause them undue distress.
17. The Agency submitted that, in the context of the [specified] Report, the requested information is private, confidential and highly sensitive, it is not in the public domain, and if released has the potential to cause stress and anxiety to the third parties and impact upon their professional reputation and livelihood.
18. The Agency further submitted it is not in the public interest to release personal affairs information in the present case as any concerns regarding [description of professional role's] ability to practice can be properly dealt with by the appropriate regulatory body, such as the [named regulatory agency].
19. Having reviewed the personal affairs information in the documents subject to review, I am of the view its disclosure would be unreasonable for the following reasons:
- (a) The information in the document is not in the public domain and is of a sensitive nature, particularly combined with the information that is publicly available in the [specified] report.
 - (b) Having regard to the context in which the document was created, I accept the individuals concerned would be reasonably likely to object to the release of their personal affairs information in the documents under the FOI Act.
 - (c) The nature of disclosure under the FOI Act is unconditional and unrestricted, which means an applicant is free to disseminate widely or use a document disclosed to them under the FOI Act as they choose.⁷
 - (d) While I acknowledge the Applicant has a genuine interest in obtaining access to the information in the document subject to review, their interest in obtaining the information is a matter of private interest. Given the context of this matter, I have determined the need to protect sensitive information of third parties outweighs the Applicant's personal interest in obtaining this information.
 - (e) In the context of this matter and noting the [specified] investigation and public report, I do not consider any public interest would be promoted by disclosure of the individual third parties' personal affairs information in the document. Having reviewed the document, I do not consider its disclosure would assist the Applicant based on the reasons for which they seek access to the document.
 - (f) I accept the Agency's submission that any concerns relating to a [description of professional role's] ability to practise should be dealt with by the appropriate regulatory body.
 - (g) In deciding whether disclosure of a document would involve the unreasonable disclosure of personal affairs information, section 33(2A) requires I take into account whether disclosure of

⁶ Section 33(2C).

⁷ *Victoria Police v Marke* [2008] VCSCA 218 at [68].

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. Having balanced the above factors, I am satisfied disclosure of the personal affairs information in the document would be unreasonable in the circumstances.
21. Accordingly, I am satisfied the document is exempt under section 33(1).

Deletion of exempt or irrelevant information

22. 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.
23. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'⁸ 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 25.⁹
24. I have considered whether it is practicable to provide an edited copy of the document with exempt information deleted from the document in accordance with section 25. I am satisfied it is not practicable to do so, as it would render the document meaningless.

Conclusion

25. On the information before me, I am satisfied the document is exempt under section 33(1).
26. As I am not satisfied it is practicable to delete the exempt information from the document in accordance with section 25, I have determined to exempt the document in full.

Review rights

27. If either party to this review is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.¹⁰
28. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹¹
29. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹²
30. 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.
31. 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.¹³

When this decision takes effect

⁸ *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].

⁹ *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].

¹⁰ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

¹¹ Section 52(5).

¹² Section 52(9).

¹³ Sections 50(3F) and (3FA).

32. My decision does not take effect until the relevant review periods (as stated above) expire.
33. If a review application is made to VCAT, my decision will be subject to any VCAT determination.