

Notice of Decision and Reasons for Decision

Applicant:	'CI6'
Agency:	Court Services Victoria
Decision date:	23 November 2020
Provision and exemptions considered:	Sections 25A(5), 30(1), 32(1), 33(1)
Citation:	'CI6' and Court Services Victoria (<i>Freedom of Information</i>) [2020] VICmr 326 (23 November 2020)

FREEDOM OF INFORMATION – refusal to process request on grounds all documents, should any exist, would be exempt – internal working documents – documents concerning Freedom of Information (FOI) request – matter in the nature of opinion, advice and recommendation – factual information – disclosure of personal affairs of agency officers – not satisfied all documents exempt under section 25A(5)

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 differs from the Agency's decision.

I am not satisfied it is apparent from the nature of the documents, as described in the request, that all documents to which the request relates would be exempt under sections 30(1), 32(1) and 33(1).

The effect of my decision is the Agency is required to search for and identify all documents relevant to the terms of the Applicant's request and assess those documents in accordance with the FOI Act.

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner

23 November 2020

Reasons for Decision

Background to review

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

I request a copy of all files, records, reports, notes and memoranda held by [the Agency] with respect to [named individual]'s letter [date], entitled "Re: Freedom of Information (Your ref [reference number])".
2. The Agency refused to grant access to documents in accordance with the Applicant's request under section 25A(5). In doing so, the Agency was not required to identify any documents relevant to the request on grounds all documents to which the request relates, should any exist, would be exempt under sections 30(1), 32(1) and 33(1).

Review

3. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
4. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
5. I have considered all communications and submissions received from the parties, including:
 - (a) the Agency's decision on the FOI request; and
 - (a) information provided by the Applicant and the Agency during the review.
6. 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.
7. I note Parliament's intention the FOI Act 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.

Preliminary view provided to Agency

8. On [date], the Agency was provided with a preliminary view on the Agency's decision that it was not apparent from the nature of the documents, as described on the face of the Applicant's request, that each document would be exempt in full under sections 30(1), 32(1) and 33(1). The Agency was invited to provide a further submission or consider making a fresh decision under section 49M.
9. On [date], the Agency advised it intended to make a fresh decision under section 49M(1). OVIC staff informed the Applicant about the Agency's fresh decision and the requirement under section 49M(2) that it be made by [date], being 28 days from the date the Agency notified OVIC and the Applicant of its intention to make a fresh decision.
10. On [date], the Agency confirmed its fresh decision was not made within the required timeframe under section 49M(2).
11. Accordingly, I am required to resume my review based on the Agency's original decision in accordance with section 49MA(3).

Review of application of section 25A(5) to refuse to grant access to documents

12. Section 25A(5) provides an agency may refuse to grant access to a request for documents, without having identified any or all of the documents, if it is apparent from the nature of the request that all documents would be exempt in full under the FOI Act, and either there is no obligation for the agency to provide the applicant with an edited copy of the documents or the applicant does not agree to receive an edited copy of the documents.
13. The power to refuse a request under section 25A(5) is carefully circumscribed. In *Knight v Corrections Victoria*,¹ the Supreme Court of Victoria held section 25A(5) will apply to an FOI request only where the following three elements are met:
 - (a) based solely on the description in the request, the decision maker must work out the inherent or essential quality or character of the documents;
 - (b) the decision maker must determine whether the documents, as described by the Applicant, are exempt. It must be apparent that all documents are exempt; and
 - (c) from the face of the request or the Applicant's declared wishes, there must be no scope to provide edited copies of any of the documents.
14. Therefore, satisfaction that each of the above elements are met means the application of section 25A(5) will apply to a limited category of cases only.

What is the essential character of the documents requested?

15. In its decision letter, the Agency states:

The documents you seek have the inherent, essential quality and character of being exempt from disclosure on the basis of sections 30 (internal working documents), 32 (documents affecting legal proceedings) and 33 (documents affecting personal privacy).

16. It is apparent the essential quality or character of the documents, as described in the Applicant's request, are documents relating to a record of correspondence to the Applicant on or around a particular date.
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 previous correspondence between the Applicant and the Agency

Would the documents requested, as described by the Applicant, be exempt?

18. As stated above, in refusing access to the requested documents under section 25A(5), the Agency submits the documents, should any exist, would be exempt under section 30(1), 32(1) and 33(1).

Application of section 30(1)

19. Section 30(1) has three requirements:
 - a) the document must disclose matter in the nature of opinion, advice or recommendation prepared by an officer or Minister, or consultation or deliberation that has taken place between officers, Ministers or an officer and a Minister;
 - b) such matter must be made in the course of, or for the purpose of, the deliberative processes involved in the functions of an agency or Minister or of the government; and

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

c) disclosure of the matter would be contrary to the public interest.

20. The exemption does not apply to purely factual material in a document.²

21. I must also be satisfied disclosure of this information would not be contrary to the public interest, which requires a 'process of the weighing against each other conflicting merits and demerits'.³

Would the documents disclose matter in the nature of opinion, advice or recommendation prepared by an officer, or consultation or deliberation that has taken place between officers in the in the course of, or for the purpose of, the deliberative processes involved in the functions of an agency?

22. I am satisfied the requested documents may contain matter in the nature of opinion, advice or recommendation prepared by an officer, or consultation or deliberation that has taken place between officers. I am also satisfied the documents, should any exist, would have been created in the course of the Agency's deliberative processes in connection with its' functions of the Agency, being the processing of an FOI request.

23. However, having considered the nature of the requested documents, should any exist, I am satisfied it is reasonably likely the documents would include factual information, which would not be exempt by virtue of section 30(3).

Would disclosure of the documents be contrary to the public interest?

24. In its decision letter, the Agency advised it would be contrary to the public interest to disclose the documents for the following reasons:

- disclosure may hinder the independence of [Agency] officers in considering matters properly if they knew preliminary communications may be disclosed to the subject of a communication;
- the documents would disclose information about [Agency's] internal processes and interactions between [Agency] officers; and
- disclosure may pose an occupational health and safety risk to staff.

25. I am unable to form a proper view on the application of the public interest test in section 30(1) without having inspected the relevant documents.

26. In any case I am satisfied, based on the nature of the requested documents, there would likely be purely factual information in one or more of documents. Accordingly, I am not satisfied each of the documents would be exempt in full under section 30(1), and the requirement under section 25A(5) for it to be apparent that all requested documents would be exempt is met.

27. The Agency also determined the documents sought would be exempt under sections 32(1) and 33(1), which I consider below for completeness.

² Section 30(3).

³ *Sinclair v Maryborough Mining Warden* [1975] HCA 17; (1975) 132 CLR 473 at [485], adopted in *Department of Premier and Cabinet v Hulls* [1999] VSCA 117 at [30].

Application of section 32(1)

28. Section 32(1) provides a document is an exempt document 'if it is of such a nature that it would be privileged from production in legal proceedings on the ground of legal professional privilege or client legal privilege'.
29. A document will be subject to legal professional privilege and exempt under section 32(1) where it contains a confidential communication:⁴
- a) between the client (or the client's agent) and the client's professional legal advisers, that was made for the dominant purpose of obtaining or providing legal advice or is referable to pending or contemplated litigation;
 - b) between the client's professional legal advisers and third parties, that was made for the dominant purpose of pending or contemplated litigation; or
 - c) between the client (or the client's agent) and third parties that was made for the purpose of obtaining information to be submitted to the client's professional legal advisers for the dominant purpose of obtaining advice on pending or contemplated litigation.
30. In its decision letter, the Agency advised the following regarding the application of section 32(1):
- The documents you seek would have been created by [Agency]'s in-house lawyers involved in the processing of FOI requests. These confidential communications would have been made for the dominant purpose of providing or obtaining legal advice.
31. While I note the Agency's decision, having considered the broad terms of the Applicant's request, I am satisfied the requested documents, should any exist, would be reasonably likely to include one or more administrative documents that would not be exempt under section 32(1) in that they would not be subject to legal professional privilege.
32. As such, I am not satisfied the requirement of section 25A(5) for it to be apparent from the terms of the FOI request that all documents are exempt is met.

Application of section 33(1)

33. 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;⁵ and
 - (a) such disclosure would be 'unreasonable'.
34. 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
35. The concept of 'unreasonable disclosure' involves balancing the public interest in the disclosure of official information with the interest in protecting the personal privacy of an individual, other than the Applicant, in the circumstances.

⁴ *Graze v Commissioner of State Revenue* [2013] VCAT 869 at [29]; *Elder v Worksafe Victoria* [2011] VCAT 1029 at [22]. See also *Evidence Act 2008* (Vic), section 119.

⁵ Sections 33(1) and (2).

⁶ Section 33(9).

Would the requested documents contain personal affairs information?

36. Based on the terms of the Applicant's request, I am satisfied there would likely be personal affairs information of individuals other than the Applicant in one or more of the documents.
37. I am also satisfied the requested documents would contain the Applicant's personal affairs information.

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

38. 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.
39. 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'.
40. 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
41. I accept the Applicant is likely aware of the identity of one or more of the relevant third parties 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.⁹
42. I note the Agency's decision letter states:

The documents you seek would contain personal information of [Agency] officers including names, telephone numbers, email addresses and locations from which they can be identified.

43. In relation to the personal affairs of an agency officer, subject to the agency demonstrating special circumstances apply, I do not consider it would be unreasonable to disclose the name of an agency officer where a document merely records or represents the officer, regardless of their seniority, carrying out their usual duties or responsibilities as a public servant. The nature of such information is to be contrasted with personal affairs information concerning an agency officer in their personal life or in a private capacity. I consider this approach accords with the object and purpose of the FOI Act and the Victorian Parliament's intention the maximum amount of information held by government be disclosed under the Act.
44. For the above reasons, I am not satisfied all personal affairs information in the documents, should any exist, would be exempt under section 33(1).
45. Similarly with section 32(1), I am not satisfied the requirement of section 25A(5) for it to be apparent from the terms of the FOI request that all documents are exempt is met.

⁷ [2008] VSCA 218 at [76].

⁸ *Victoria Police v Marke* [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.

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

46. Section 25 requires an agency to grant access to an edited copy of a document containing exempt or irrelevant information if it is practicable for the agency to delete such information, and if the applicant is agreeable to receiving such a copy.
47. Determining what is 'practicable' requires consideration of the effort involved in making the deletions 'from a resources point of view',¹⁰ and the effectiveness of the deletions – that is, whether editing a document would render it meaningless.¹¹
48. Having considered the particular circumstances of this matter, I am satisfied there would likely be scope for the Agency to provide the Applicant with an edited copy of one or more of the requested documents, should any exist, with exempt information deleted in accordance with section 25. I am also satisfied it would be practicable for the Agency to do so as it would likely not require substantial time and effort, and the edited documents would likely retain sufficient meaning for the Applicant given the context of their request.
49. As such, I am not satisfied the requirement of section 25A(5) for there to be no scope to provide the Applicant with edited copies of any of the documents is met.

Conclusion

50. As stated above, the power for an agency to refuse a request under section 25A(5) is carefully circumscribed and will apply to a limited category of cases only.
51. Having carefully considered the application of section 25A(5) to the requested documents and for the reasons set out above, I am not satisfied it is apparent from the terms of the Applicant's request that all documents relevant to the request would be exempt in full under sections 30(1), 32(1) and 33(1).
52. I am also satisfied it would be practicable for the Agency to provide an edited copy of one or more of the requested documents with exempt information deleted in accordance with section 25.
53. Accordingly, I am not satisfied each of the requirements of section 25A(5) are met such that the Applicant's request for access to the requested documents can be categorically refused.
54. The effect of my decision is the Agency is required to search for and identify documents relevant to the terms of the Applicant's request and assess those documents in accordance the FOI Act.

Review rights

55. 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
56. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹³
57. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹⁴

¹⁰ *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].

¹¹ *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].

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

¹³ Section 52(5).

58. 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.
59. 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

When this decision takes effect

60. My decision does not take effect until the Agency's 14 day review period expires. If a review application is made to VCAT, my decision will be subject to any VCAT determination.

¹⁴ Section 52(9).

¹⁵ Sections 50(3F) and (3FA).