

Notice of Decision and Reasons for Decision

Applicant:	'CI2'
Agency:	Department of Health and Human Services
Decision date:	18 November 2020
Provision and exemption considered:	Sections 25A(5), 33(1)
Citation:	'CI2' and Department of Health and Human Services (<i>Freedom of Information</i>) [2020] VICmr 322 (18 November 2020)

FREEDOM OF INFORMATION – complaint to agency – personal affairs information of the applicant – refusal to process request on grounds all documents, should any exist, would be exempt – disclosure of personal affairs of applicant not 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 documents requested by the Applicant under the FOI Act.

My decision on the Applicant's request differs from the Agency's decision in that 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 section 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
18 November 2020

Reasons for Decision

Background to review

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

... record of complaint I made to [named person], on [specific date], Whom I believed worked for DHS at [named location] or [named location] ...
2. The Agency refused to grant access to documents in accordance with the Applicant's request under section 25A(5). In doing so under section 25A(5), the Agency was not required to identify any documents relevant to the request on grounds all documents to which the request, should any exist, relates would be exempt under section 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
 - (b) 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 that it was not apparent from the nature of the documents, as described on the face of the Applicant's request, that section 33(1) would apply to all relevant documents such that they would each be exempt in full. The Agency was invited to provide a further submission or consider making a fresh decision.
9. On [date], the Agency provided a written submission. In summary, the Agency maintained its decision to refuse access to documents on grounds any documents relevant to the terms of the request would be exempt in full under section 33(1).

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

10. 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 all documents would be exempt under the FOI Act and removal of exempt information from the documents would not facilitate release, or where it is clear the applicant does not seek an edited copy of the documents.

11. 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.
12. 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?

13. 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 complaint made by the Applicant on or around a particular date.
14. In its decision letter, the Agency states:

The information you have requested, should it exist, would be located on your child's protection file. The department is required to consider whether release of information on a child's file is in their best interest, regardless of who the information is about. In the instance where a parent requests information that would be stored upon their child's child protection file, it is not considered to be in the best interest of the child to release that information to the privacy and wellbeing of the child.

15. I am satisfied the essential character of the documents requested by the Applicant, would concern a complaint made by the Applicant relating to their children.

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

16. In refusing access to the requested documents under section 25A(5), the Agency submits the documents, should any exist, would be exempt under section 33(1).

Application of section 33(1)

17. 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;² and
 - (b) such disclosure would be 'unreasonable'.

Would the documents contain personal affairs information?

18. 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.³

¹ *Knight v Corrections Victoria* [2010] VSC 338 (per Bell J).

² Sections 33(1) and (2).

³ Section 33(9).

19. Information relates to an individual's personal affairs if it 'concerns or affects that person as an individual'.⁴
20. I am satisfied the requested documents, should any exist, would contain the Applicant's personal affairs information, as well as other individuals, including the Applicant's children.

Would disclosure involve the unreasonable disclosure of personal affairs information?

21. 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.

22. I consider the following matters are relevant in the circumstances of this matter:

- (a) the nature of the personal affairs information, for example, whether it is sensitive or its current relevance;
- (b) the circumstances in which the information was obtained, for example, whether it was obtained involuntarily or in confidence;
- (c) the Applicant's interest in the information, including the purpose for seeking access to the documents;
- (d) whether any public interest would be promoted by releasing the personal affairs information;
- (e) whether the individuals to whom the information relates object to the release of the information;
- (f) the likelihood of further disclosure of the information, if released; and
- (g) whether disclosure of the information would, or would be reasonably like to, endanger the life or physical safety of any person.

23. In summary, I have determined disclosure of the personal affairs information of third parties in the requested documents would not be unreasonable in the circumstances for the following reasons:

(a) The nature of the information to be disclosed

I acknowledge information in the requested documents, should any exist, would be sensitive and personal in nature. However, where the information relates to the Applicant or is information provided by the Applicant to the Agency, I consider it would be reasonable to release this information to the Applicant in these circumstances.

(b) The circumstances in which the information was obtained

As stated above, it is apparent from the terms of the Applicant's FOI request, certain information in the requested documents would have been obtained by the Agency from the Applicant as it would relate to a complaint made by the Applicant to the Agency.

(c) The Applicant's interest in the information being disclosed

I acknowledge the Applicant's personal interest in this matter given the requested documents relate to their complaint made to the Agency.

⁴ *Hanson v Department of Education & Training* [2007] VCAT 123.

In the circumstances of this matter, I am of the view to release the information in the documents, should any exist, may further the Applicant's understanding of any decisions made by the Agency arising from the complaint made.

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

On the information before me, it is not apparent any public interest would be served by release of the information to the Applicant. It is clear access would serve a private interest, rather than a public interest.

(e) Whether the individuals whose personal affairs information are included in the documents would be likely to object to the release of that information

Any documents would contain the personal affairs information of the Applicant, as well as their children. The documents may also contain the personal affairs information of Agency officers and other third parties.

Given the Applicant made the complaint and provided information to the Agency, I am satisfied by virtue of them making an FOI request that they consent to the release of their personal affairs information in any documents.

However, where information relates to the personal affairs information of persons other than the Applicant and their children, I am satisfied those third parties would be reasonably likely to object to the release of their personal affairs information in any documents under the FOI Act in light of the nature of the documents, as discussed above.

(f) The likelihood of further disclosure of the information, if release

The FOI Act does not impose any conditions or restrictions on an applicant's use of documents obtained under the FOI Act. Accordingly, I must consider the likelihood and potential effects of further dissemination of a third party's personal affairs information, if released.

While a possibility, I have no information before me to indicate a real likelihood any documents containing the personal affairs information of third parties would be further disseminated by the Applicant given the circumstances of this matter.

(g) Whether disclosure of the information would, or would be reasonably like 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 matter.

24. Having weighed up the above factors, I am not satisfied all documents or all information in the documents, should any exist, would be exempt under section 33(1).
25. Further, based on similar FOI requests made to the Agency and previously determined on review, I consider other exemptions under the FOI Act and the *Children Youth and Families Act 2005* (Vic) would also likely apply to the requested documents, should any exist. However, in circumstances where the parent of a child made a complaint to the Agency and seeks access to all related documents, I am unable to be satisfied, on the face of the FOI request, that each and every document would be exempt in full under the FOI Act.
26. Accordingly, I am not satisfied this requirement of section 25A(5) is met in this instance.

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

27. 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.
28. Determining what is 'practicable' requires consideration of the effort involved in making the deletions 'from a resources point of view',⁵ and the effectiveness of the deletions – that is, whether editing a document would render it meaningless.⁶
29. The Agency's decision letter states, 'editing the documents to be fit for release would be impossible, as any exempt information would be so entwined with the document as a whole that the resulting document would be meaningless and/or misleading.'
30. Having considered the particular circumstances of this matter, I am satisfied there would 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.
31. I am also satisfied it would be practicable for the Agency to do so as it would not require substantial time and effort, and the edited documents would likely retain sufficient meaning for the Applicant given the context of their request.
32. Accordingly, I am not satisfied this requirement of section 25A(5) is met in this instance.

Conclusion

33. 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.
34. 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 section 33(1), or other exemptions under the FOI Act.
35. I am also satisfied it would be practicable for the Agency to provide an edited copy of one or more documents to the Applicant with exempt information deleted in accordance with section 25.
36. 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.
37. 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

38. 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.⁷
39. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.⁸

⁵ *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].

⁶ *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].

⁷ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

40. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.⁹
41. 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.
42. 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.¹⁰

When this decision takes effect

43. 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.

⁸ Section 52(5).

⁹ Section 52(9).

¹⁰ Sections 50(3F) and (3FA).