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Information Commissioner

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## Notice of Decision and Reasons for Decision

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Applicant:	'BX5'
Agency:	RSPCA (Victoria)
Decision date:	18 August 2020
Exemption considered:	Section 33(1)
Citation:	'BX5' and RSPCA (Victoria) (Freedom of Information) [2020] VICmr 225 (18 August 2020)

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FREEDOM OF INFORMATION – personal affairs information – agency officer names – unreasonable disclosure

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 fresh decision.

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

As I am satisfied it is practicable to delete the exempt information in the document in accordance with section 25, I have determined to release the document in part.

My reasons for decision follow.

**Joanne Kummrow**

Public Access Deputy Commissioner

18 August 2020

## Reasons for Decision

### Background to review

1. The Applicant made a request to the Agency seeking access to certain documents.
2. Following consultation with the Agency, the Applicant clarified the terms of their request as follows:

Copy of diary notes, files, CD's, recordings, emails or letters between either [the Agency] and [another Department] between the [specified dates], regarding [the Applicant], and livestock at [address in Victoria].
3. In its decision, the Agency identified one document falling within the terms of the Applicant's request and refused access to the document in full.

### Review

4. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access to the document.
5. Section 49M(1) permits an agency to make a fresh decision on an FOI request during a review.
6. On [date], the Agency made a fresh decision in accordance with section 49M(2). It determined to release one page in part and one page in full following the Applicant's agreement to receive an edited copy of the document with exempt information deleted in accordance with section 25.
7. The Applicant did not agree with the Agency's fresh decision and, as required by section 49MA(2), I proceeded with my review on the basis of the fresh decision.
8. During the review, the Applicant indicated they seek review of the Agency's decision to refuse access to the personal affairs information of Agency officers. Accordingly, this review relates to the information on page one, to which access was refused in part under section 33(1).
9. In the course of the review, the Applicant raised concerns with OVIC staff about the adequacy of the Agency's search in response to their FOI request. In accordance with section 61B(3), these concerns were addressed as part of this review.
10. OVIC staff made extensive inquiries with the Agency into these concerns and advised the Applicant of our findings. In the circumstances, I am satisfied the Applicant's concerns have been addressed to the fullest extent possible and no further inquiries are required.
11. I have examined a copy of the document subject to review.
12. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
13. 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.
14. I note Parliament's intention the FOI Act must be interpreted so as to further the object of the Act and that 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 exemption

15. The Agency relied on the exemption in section 33(1) to refuse access to the document in part. The Agency's fresh decision letter sets out the reasons for its decision.

### **Section 33(1)**

16. 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;<sup>1</sup> and
  - (b) such disclosure would be 'unreasonable'.
17. Information relating to a person's 'personal affairs' includes, but is not limited to, information that identifies any person, or discloses their address or location. It also includes any information from which such information may be reasonably determined.<sup>2</sup>
18. Personal affairs information that relates to an individual 'concerns or affects that person as an individual'.<sup>3</sup>
19. 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.<sup>4</sup>
20. 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.<sup>5</sup>

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

21. The information exempted by the Agency is the names and emails of individuals other than the Applicant.
22. Based on the terms of the Applicant's request, and the nature of the document subject to review, I am satisfied the document contains the personal affairs information of Agency officers.

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

23. The concept of 'unreasonable disclosure' involves balancing the public interest in the disclosure of official information with the protection of an individual's right to personal privacy in the particular circumstances.
24. In *Victoria Police v Marke*,<sup>6</sup> 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'. The Court further

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<sup>1</sup> Sections 33(1) and (2).

<sup>2</sup> Section 33(9).

<sup>3</sup> *Hanson v Department of Education & Training* [2007] VCAT 123.

<sup>4</sup> *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].

<sup>5</sup> *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].

<sup>6</sup> [2008] VSCA 218 at [76].

held, '[t]he protection of privacy, which lies at the heart of s 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'.<sup>7</sup>

25. Whether or not an agency staff member's personal affairs information is exempt under section 33(1), must be considered in the context of the particular circumstances of each matter.<sup>8</sup>
26. Therefore, 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'.<sup>9</sup>
27. The following matters are particularly relevant in the current 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 their purpose for seeking access to the documents);
  - (d) whether any public interest would be promoted by release of the information;
  - (e) whether the individuals to whom the information relates object, or would be likely to object to the release of the information;
  - (f) the likelihood of further disclosure of the information, if released;
  - (g) whether disclosure of the information would, or would be reasonably likely to, endanger the life or physical safety of any person; and
  - (h) the Agency's consultation with the relevant third parties, some of which objected to the disclosure of their personal affairs information.
28. On balance, I consider the release of the document would involve unreasonable disclosure of the personal affairs information of individuals for the following reasons:
  - (a) The personal affairs information relates to the identity of third parties, being the names of Agency officers and those of another government agency.
  - (b) I acknowledge the Applicant's personal interest in the information.
  - (c) I note the document was carefully assessed by the Agency so as to release information regarding the Applicant, wherever possible, and the only information exempted is the names of Agency officers and other government agency staff.
  - (d) The names of the third parties feature in the document in the context of their professional roles as public servants, rather than in their personal or private capacity. In such cases, I am of the view it will generally be where special circumstances apply only that the disclosure of the names of public servants will be unreasonable.
  - (e) In this case, it is clear from the [content] of the documents, the Applicant's engagement with the Agency involves matters of a serious nature. Therefore, I consider the context in which the

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<sup>7</sup> [2008] VSCA 218 at [79].

<sup>8</sup> *Coulson v Department of Premier and Cabinet (Review and Regulation)* [2018] VCAT 229.

<sup>9</sup> [2008] VSCA 218 at [104].

names of the third parties feature in the document is sensitive for those individuals. This is reflected by the fact certain third parties named in the document objected to the disclosure of their personal affairs information. I consider other third parties would be reasonably likely to object to the release of their personal affairs information in the document to the Applicant under the FOI Act given the Agency's involvement with the Applicant. As such, I consider the release of this information would be reasonably likely to cause stress and anxiety to those third parties.

- (f) I am not satisfied there is an overriding public interest in the release of the personal affairs information in the document that outweighs the personal privacy of those concerned. There is no information before me to demonstrate the public interest would be promoted by disclosure of personal affairs information in the document to the Applicant.
- (g) I am also required to consider whether disclosure of information would, or would be reasonably likely, to endanger the life or physical safety of any person.<sup>10</sup> On the information before me, and having considered the information in the document, I am satisfied this factor is a relevant consideration in this matter.

29. Have weighed up the above factors, I am satisfied the personal affairs information in the document is exempt under section 33(1).

#### ***Deletion of exempt or irrelevant information***

- 30. 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.
- 31. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'<sup>11</sup> 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.<sup>12</sup>
- 32. I have considered whether it would be practicable to provide the Applicant with an edited copy of the document with exempt information deleted in accordance with section 25. I am satisfied it is practicable to delete the exempt information, as to do so would not require substantial time and effort, and the edited document will retain meaning.

#### ***Conclusion***

- 33. On the information before me, I am satisfied certain information in the document is exempt under section 33(1).
- 34. As I am satisfied it is practicable to delete the exempt information in the document in accordance with section 25, I have determined to release the document in part.

#### ***Review rights***

- 35. 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.<sup>13</sup>

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<sup>10</sup> Section 33(2A).

<sup>11</sup> *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].

<sup>12</sup> *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].

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

36. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.<sup>14</sup>
37. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.<sup>15</sup>
38. Information about how to apply to VCAT is available online at [www.vcat.vic.gov.au](http://www.vcat.vic.gov.au). Alternatively, VCAT may be contacted by email at [admin@vcat.vic.gov.au](mailto:admin@vcat.vic.gov.au) or by telephone on 1300 018 228.
39. 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.<sup>16</sup>

***When this decision takes effect***

40. My decision does not take effect until the relevant review period (stated above) expires.

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<sup>14</sup> Section 52(5).

<sup>15</sup> Section 52(9).

<sup>16</sup> Sections 50(3F) and (3FA).