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Notice of Decision and Reasons for Decision

Applicant:	'CB7'
Agency:	RSPCA (Victoria)
Decision date:	17 September 2020
Exemptions considered:	Sections 33(1), 34(1)(b)
Citation	'CB7' and RSPCA (Victoria) (Freedom of Information) [2020] VICmr 263 (17 September 2020)

FREEDOM OF INFORMATION – personal affairs information – agency officer names – unreasonable disclosure – matters of a business, commercial or financial nature – would not expose undertaking unreasonably to disadvantage

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 have decided to release additional information in the documents.

I am satisfied the personal affairs information in the documents is exempt under section 33(1).

However, I am not satisfied financial information in the documents is exempt under section 34(1)(b).

As I am satisfied it is practicable to provide an edited copy of the documents with the exempt information deleted in accordance with section 25, I have determined to grant access to the documents in part.

The Schedule of Documents in **Annexure 1** sets out my decision in relation to each document.

My reasons for decision follow.

Joanne Kummrow

Public Access Deputy Commissioner

17 September 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:
 - A copy of the transfer document between [the Agency] and [third party service provider] for the [animals] seized from [specific address].
 - A copy of any agreement between [the Agency] and the above-mentioned [third party service provider].
 - A copy of the financial receipt if any funds were exchanged between [the Agency] and the [third party service provider] in regard to the transfer of [animals] seized from [specific address].
3. In its decision, the Agency identified four documents falling within the terms of the Applicant's request. The Agency released one document in full and relied on the exemption in sections 33(1) and 34(1)(b) to refuse access to the remaining three documents in part. The Agency's decision letter sets out the reasons for its decision.

Review

4. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access to the documents.
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 examined a copy of the documents subject to review and considered all relevant communications received from the parties in relation to this review.
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 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.

Search and missing document concerns

9. In the course of the review, the Applicant raised a number of concerns about the adequacy of the Agency's search and whether documents were missing. In accordance with section 61B(3), these concerns are addressed as part of my review.
10. OVIC staff made inquiries with the Agency regarding the concerns and findings were communicated to the Applicant on [date]. I am satisfied the Agency has identified relevant documents in its possession and the Applicant's concerns have been pursued to the fullest extent and there is no basis for the making of further inquiries or taking further action.

Review of exemptions

Section 33(1)

11. 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'.
12. 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.²
13. Personal affairs information that relates to an individual 'concerns or affects that person as an individual'.³
14. 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.⁴
15. 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.⁵

Do the documents contain the 'personal affairs information' of individuals other than the Applicant?

16. I am satisfied the documents contain the personal affairs information of individuals other than the Applicant, including the names, signatures and contact details of Agency officers, members of the public and an external service provider.

Would disclosure of the personal affairs information in the documents be unreasonable?

17. The concept of 'unreasonable disclosure' involves balancing the public interest in disclosure of official information with the protection of a person's right to privacy in the particular circumstances.
18. The Supreme Court of Victoria Court of Appeal has 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'.⁶ The Court also stated, '[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'.⁷
19. The 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'.⁸

¹ Sections 33(1) and (2).

² Section 33(9).

³ *Hanson v Department of Education & Training* [2007] VCAT 123.

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 *Ibid.*

⁶ [2008] VSCA 218 at [76].

⁷ [2008] VSCA 218 at [79].

⁸ [2008] VSCA 218 at [104].

20. In determining whether disclosure of personal affairs information in the document would be unreasonable, I have considered the following factors in this case:

(a) The nature of the personal affairs information and the circumstances in which the information was obtained

The personal affairs information in the documents was provided in the context of a commercial contract entered into between the Agency and an external service provider.

I consider the personal affairs information of Agency officers named in the documents is recorded in the context of their professional roles as public servants, rather than in their personal or private capacity.

(b) 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.⁹

The Applicant did not provide clear reasons as to why they seek access to the personal affairs information of third parties in the documents.

(c) Whether any public interest would be promoted by disclosure of the information

Having reviewed the documents, I note the Agency disclosed all substantive information in the documents to the Applicant except for the personal affairs information and some pricing information.

The Applicant did not provide any information to support any public interest that would be promoted by release of the personal affairs information in the documents.

In the circumstances, I am not satisfied there is an overriding public interest in the release of the personal affairs information in the documents that outweighs the personal privacy of the third parties concerned. Rather, I consider the Applicant's interest in the information would serve a personal interest only.

(d) Whether the individuals to whom the information relates object, or would be likely to object, to the disclosure of the information

I have reviewed the consultation documents provided by the Agency and note a third party objected to the disclosure of their personal affairs information in the documents. While the view of a third party is a relevant consideration, it is not determinative.

However, in the context of this matter, I consider this factor weighs against disclosure given the nature of the personal affairs information in the documents and relationship to the third party's private home and business.

I consider the Applicant's engagement with the Agency involves matters of a serious nature. Therefore, I consider the context in which the names of the third parties feature in the documents is sensitive for those individuals. As such, I consider the disclosure of this information would be reasonably likely to cause stress and anxiety to those third parties.

⁹ *Victoria Police v Marke* [2008] VSCA 218 at [104].

- (e) Whether the disclosure of information would, or would be reasonably likely to endanger the life or physical safety of any person¹⁰

There is no information before me to suggest this is a relevant factor in this matter.

21. Having weighed up the above factors, on balance, I am satisfied disclosure of all personal affairs information in the documents would be unreasonable in the circumstances.
22. The Schedule of Documents in **Annexure 1** sets out my decision in relation to section 33(1).

Section 34(1)(b)

23. Section 34(1)(b) provides a document is an exempt document if its disclosure under the FOI Act would disclose information acquired by an agency from a business, commercial or financial undertaking and:
- (a) the information relates to other matters of a business, commercial or financial nature; and
 - (b) the disclosure of the information would be likely to expose the undertaking unreasonably to disadvantage.
24. The phrase ‘information acquired’ in section 34(1) signifies the need for some positive handing over of information in some precise form.¹¹
25. The phrase, ‘business, commercial or financial nature’ should be given its ordinary meaning.¹²
26. The Agency advised it consulted with the third party undertaking and it objects to disclosure, raising concerns about competitors gaining access to its pricing structure.
27. I am satisfied the information is of a business nature, as it relates to costs, and the information was acquired by the Agency as part of agreeing to contracts of services to be provided by the undertaking.
28. Section 34(2) provides:

In deciding whether disclosure of information would expose an undertaking unreasonably to disadvantage, for the purposes of paragraph (b) of subsection (1), an agency or Minister may take account of any of the following considerations—

- (a) whether the information is generally available to competitors of the undertaking;
- (b) whether the information would be exempt matter if it were generated by an agency or a Minister;
- (c) whether the information could be disclosed without causing substantial harm to the competitive position of the undertaking; and
- (d) whether there are any considerations in the public interest in favour of disclosure which outweigh considerations of competitive disadvantage to the undertaking, for instance, the public interest in evaluating aspects of government regulation of corporate practices or environmental controls—

and of any other consideration or considerations which in the opinion of the agency or Minister is or are relevant.

¹⁰ Section 33(2A).

¹¹ *Thwaites v Department of Human Services* (1999) 15 VAR 1.

¹² *Gibson v Latrobe CC* [2008] VCAT 1340 at [25].

29. Section 34(1)(b) contemplates disclosure of a document under the FOI Act may expose an undertaking to a certain measure of disadvantage. However, what must be established is that any such exposure would be unreasonable in the circumstances.
30. Based on the information before me, I am not satisfied disclosure of the financial information in the documents would cause substantial harm to the competitive position of the undertaking for the purposes of section 34(1)(b) for the following reasons:
- (a) While I accept disclosure of the undertaking's financial information could allow its competitors to compete for similar business offering lower prices, I consider it is likely the Agency's procurement decisions may also take into account other factors other than an undertaking's pricing only.
 - (b) I also note the pricing information was current as at [year] and [year] and is likely to have been superseded by new pricing information such that any sensitivity regarding the undertaking's pricing would have subsided due to the passage of time.
 - (c) In this case, I am satisfied the Applicant is not a commercial competitor of the Agency and their likely purpose of seeking access to the information is not directed at causing harm to the competitive position of the undertaking.
 - (d) While the business undertaking may have concerns about a breach of confidentiality in terms of its commercial dealings with the Agency should the documents be disclosed, it is inherent in the nature of transactions between the private and public sector, which relies on public funds, that an undertaking's commercial information may be subject to access and disclosure under the FOI Act in the interests of transparency and accountability.
31. Accordingly, I am not satisfied the financial information in the documents is exempt under section 34(1)(b).
32. The Schedule of Documents in **Annexure 1** sets out my decision in relation to section 34(1)(b).

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 would be practicable to provide the Applicant with an edited copy of the documents in accordance with section 25. I am satisfied it would be practicable to do so as the work involved would not be substantial and the documents would retain meaning.

Conclusion

36. On the information before me, I am satisfied the personal affairs information in the documents is exempt under section 33(1).

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].

37. However, I am not satisfied financial information in the documents is exempt under section 34(1)(b).
38. As I am satisfied it is practicable to provide an edited copy of the documents with the exempt information deleted in accordance with section 25, I have determined to grant access to the documents in part.
39. The Schedule of Documents in **Annexure 1** sets out my decision in relation to each document.

Review rights

40. 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.¹⁵
41. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹⁶
42. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹⁷
43. 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.
44. 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.¹⁸

Third party review rights

45. As I have determined to release documents that contain information of a business, commercial or financial nature relating to a business undertaking, if practicable, I am required to notify the undertaking of its right to seek review by VCAT of my decision within 60 days from the date it is given notice.¹⁹
46. In this case, I am satisfied it is practicable to notify the business undertaking of its third party review right and confirm they will be notified by OVIC of my decision.

When this decision takes effect

47. Accordingly, my decision does not take effect until the third parties' 60 days review period expires, or if an application to VCAT is made, until the VCAT proceeding is concluded.

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

¹⁶ Section 52(5).

¹⁷ Section 52(9).

¹⁸ Sections 50(3F) and (3FA).

¹⁹ Sections 49P(5), 50(3A) and 52(3).

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
1.	[Date]	[Animal] – transfer document	23	Released in full	Not subject to review	
2.	[Date]	[Third party service provider] Letter of Agreement	4	Released in part Sections 33(1), 34(1)(b)	Release in part Sections 33(1), 25 The following information exempted by the Agency under section 34(1)(b) is not exempt and is to be released: <ul style="list-style-type: none"> Page 2 – monetary figure at paragraph 5a. 	<p>Section 33(1): I am satisfied disclosure of the personal affairs information of third parties, including Agency officers, would be unreasonable in the circumstances. Accordingly, this information is exempt under section 33(1).</p> <p>Section 34(1)(b): I am not satisfied disclosure of the financial information would be likely to expose the business undertaking unreasonably to disadvantage. Accordingly, this information is not exempt under section 34(1)(b).</p> <p>Section 25: As I am satisfied it is practicable to provide an edited copy of the documents with the exempt information deleted in accordance with section 25.</p>
3.	[Date]	[Third party service provider] Letter of	5	Released in part Sections 33(1),	Release in part Sections 33(1), 25	See comments for Document 2 above.

Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
		Agreement		34(1)(b)	<p>The following information exempted by the Agency under section 34(1)(b) is not exempt and is to be released:</p> <ul style="list-style-type: none"> Page 2 – monetary figures at paragraph 5a. 	
4.	[Date]	[Third party service provider] Letter of Agreement [date]	10	Released in part Sections 33(1), 34(1)(b)	<p>Release in part Sections 33(1), 25</p> <p>The following information exempted by the Agency under section 34(1)(b) is not exempt and is to be released:</p> <ul style="list-style-type: none"> Page 2 – monetary figures at paragraph 5a(i) and (ii); and Page 3 – monetary figures at paragraph 5b(i). 	See comments for Document 2 above.