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Notice of Decision and Reasons for Decision

Applicant:	'CN8'
Agency:	Department of Education and Training
Decision date:	20 January 2021
Exemptions considered:	Sections 30(1), 33(1)
Citation:	'CN8' and Department of Education and Training (<i>Freedom of Information</i>) [2021] VICmr 16 (20 January 2021)

FREEDOM OF INFORMATION – school documents – education documents – management of schools – management of workplace – reporting student issues and incidents

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 a document requested by the Applicant under the FOI Act.

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

However, I am not satisfied all information the Agency determined to be exempt under section 33(1) is exempt, or that section 30(1) applies to the remaining information in the document that I have determined is not otherwise exempt under section 33(1).

Accordingly, I have decided to release additional information in the document.

As I am satisfied it is practicable to provide the Applicant with an edited copy of the document with exempt and irrelevant information deleted, I have granted access to the document in part.

The Schedule of Documents in **Annexure 1** sets out my decision.

My reasons for decision follow.

Joanne Kummrow

Public Access Deputy Commissioner

20 January 2021

Reasons for Decision

Background to review

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

...correspondence between [Name] School and [Region], Regional Services Group about me. Specifically, the emails provided to [named person] on [date] [FOI request reference number], on pages [9 pages listed].

[Named person] agrees that should the subject of these emails touch on personal information in relation to [named person's child], as [their] guardian, [they] gives [their] consent.

2. In its decision, the Agency identified the nine pages listed in the Applicant's request and refused access to the document in part under sections 30(1) and 33(1). 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. In their application for review, the Applicant indicated they do not seek review of the names or telephone numbers of individuals in the document.
5. I have examined a copy of the document 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 submission received from the parties.
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.
9. I note Parliament's intention the FOI Act must 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.

Review of exemptions

10. My decision considers the application of section 33(1) first, and then section 30(1).

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'.

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

- 12. Information relating to an individual'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.²
- 13. A document will disclose a third party's personal affairs information if it is capable, either directly or indirectly, of identifying that person. As the nature of disclosure under the FOI Act is unrestricted and unconditional, this is to be interpreted by reference to the capacity of any member of the public to identify a third party.³
- 14. As noted above, the Applicant does not seek review of the names or telephone numbers of individuals, which excludes most of the personal affairs information in the document. However, having reviewed the document, I am satisfied that while certain information does not contain such information, the Applicant or others would be nevertheless capable of identifying persons other than the Applicant (**third parties**).

Would disclosure of the personal affairs information be unreasonable?

- 15. The concept of 'unreasonable disclosure' involves balancing the public interest in the disclosure of official information with the protection of a third party's personal privacy in the circumstances.
- 16. In relation to personal affairs information of Agency officers, the Victorian and Civil Administrative Tribunal (**VCAT**) has generally accepted there is nothing particularly sensitive about matters concerning or arising out of the course of one's official duties.⁴
- 17. I adopt the view expressed by the Victorian Court of Appeal in *Victoria Police v Marke*,⁵ in which it was 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'. Further, '[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'.⁶
- 18. I acknowledge the Applicant may know certain third parties mentioned in the documents. However, even where an applicant claims to know a third party involved, disclosure of personal affairs information may still be unreasonable.⁷
- 19. In determining whether disclosure of personal affairs information would be unreasonable in these circumstances, I have considered the following factors:

¹ Sections 33(1) and (2).

² Section 33(9).

³ *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].

⁴ *Milthorpe v Mt Alexander Shire Council* (1997) 12 VAR 105.

⁵ [2008] VSCA 218 at [76].

⁶ [2008] VSCA 218 at [79].

⁷ *AB v Department of Education and Early Childhood Development* [2011] VCAT 1263 at [58]; *Akers v Victoria Police* [2003] VCAT 397.

(a) The nature of the information in the document and the circumstances in which the information was obtained by the Agency

Having considered the nature of certain personal affairs information in the document, I am satisfied it was communicated with an expectation of confidentiality and is somewhat sensitive and personal in nature.

Other information in the document is merely administrative in nature and does not concern the personal circumstances of persons involved in the communications.

(b) Whether individuals to whom the information relates would object, or would be reasonably likely to object to the release of the information

In determining 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 affairs information and seek their views on disclosure of their personal affairs information.⁸ However, this obligation will generally not arise if consultation would cause a third party physical harm or undue distress, or is otherwise not reasonable or practicable in the circumstances.⁹

In this matter, the Agency determined it would be unreasonable to consult with the relevant third parties as it would be likely to cause those persons undue stress or would otherwise be unreasonable.

Having reviewed the document and considered the circumstances in which it was created, I am satisfied it is reasonably likely the third parties would object to disclosure of their personal affairs information in the document.

(c) The likelihood of further disclosure of the information, if released

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 as they choose.¹⁰ Accordingly, I must consider the likelihood and potential effect of further dissemination of a third party's personal affairs information, if released.

Noting certain information in the document is somewhat sensitive and personal in nature and on the information before me, I am satisfied it is reasonably likely the Applicant would disseminate the documents, if released in full.

(d) The Applicant's interest in the information

The FOI Act provides a general right of access exercisable 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.¹¹

I accept the Applicant seeks to obtain further information in the document as they consider they 'have a right to know what personal information the State of Victoria is holding on [them]'

⁸ Section 33(2B).

⁹ Section 33(2C).

¹⁰ *Victoria Police v Marke* [2008] VSCA 218 at [68].

¹¹ *Victoria Police v Marke* [2008] VSCA 218 at [104].

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

While I acknowledge the Applicant's personal interest in obtaining access to the document subject to review in full, this does not necessarily equate to a right of access to all documents prepared by the Agency where disclosure of a document in full may undermine the confidentiality of valid Agency communications necessary to ensure the integrity and effectiveness of a school's internal processes to assist it in dealing with sensitive issues affecting its employees.

Having reviewed the document and noting the substantive information that was released by the Agency, I consider the Applicant's interest in remaining personal affairs information would most likely serve their personal interest rather than any public interest in the release of such information in the circumstances.

(f) Whether disclosure of the information would or would be reasonably likely to, endanger the life or physical safety of any person.

In determining if release of personal affairs information would be unreasonable, I am required to take into account whether or not disclosure of the personal affairs information would be reasonably likely to endanger the life or physical safety of any person.¹² Having considered the circumstances of this matter, I consider this is a potentially relevant factor that weighs against disclosure of certain personal affairs information of third parties.

20. Having weighed up the above factors, on balance, I am satisfied disclosure of certain personal affairs information in the document would be unreasonable such as, position titles and personal information communicated by Agency officers with an expectation of confidentiality. I consider the remaining information that was exempted by the Agency is administrative in nature in that it concerns the ordinary operations of school and incident management handled by the Agency which, on balance, I am satisfied would not be unreasonable to disclose.

21. My decision in relation to section 33(1) is outlined in the Schedule of Documents in **Annexure 1**.

Section 30(1)

22. 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
- (c) disclosure of the matter would be contrary to the public interest.

23. The exemption does not apply to purely factual material in a document.¹³

24. The term 'officer of an Agency' is defined in section 5(1). It includes a member of an agency, a member of an agency's staff, and any person engaged by or on behalf of an agency, whether or not that person is subject to the *Public Administration Act 2004* (Vic).

¹² Section 33(2A).

¹³ Section 30(3).

Does the document contain information in the nature of opinion, advice, recommendation, consultation or deliberation?

25. For the requirements of section 30(1) to be met, the document must contain matter in the nature of opinion, advice or recommendation prepared by an officer of an agency, or consultation or deliberation between officers.
26. It is not necessary for a document to be in the nature of opinion, advice or recommendation. Rather, the issue is whether release of the document would disclose matter of that nature.¹⁴
27. Section 30(3) provides purely factual information is not exempt under section 30(1). This provision must be considered in conjunction with section 25, which allows for an edited copy of a document to be released with exempt or irrelevant material deleted, where it is practicable to do so.
28. Having reviewed the document, I am satisfied certain information exempted by the Agency under section 30(1) is in the nature of consultation between Agency officers. However, having carefully reviewed the document, I am satisfied that certain information is purely factual and is not subject to section 30(1) by virtue of section 30(3).

Was the document made in the course of, or for the purpose of, the deliberative processes involved in the functions of the Agency?

29. The term ‘deliberative process’ is interpreted widely and includes any of the processes of deliberation or consideration involved in the functions of an agency, Minister or government.¹⁵
30. In *Re Waterford and Department of Treasury (No.2)*,¹⁶ the Administrative Appeals Tribunal held:

... “deliberative processes” [is] wide enough to include any of the processes of deliberation or consideration involved in the functions of an agency... In short, ...its thinking processes — the processes of reflection, for example, upon the wisdom and expediency of a proposal, a particular decision or a course of action.
31. Having reviewed the document, I am satisfied certain information was provided in the course of the Agency’s deliberative processes in relation to the management of schools, a workplace and Agency officers.

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

32. In determining if disclosure of the document would be contrary to the public interest, I must consider all relevant facts and circumstances remaining mindful the object of the FOI Act is to facilitate and promote the disclosure of information.
33. In its decision letter, the Agency identified the following factors as weighing against disclosure of certain information:
 - the degree of sensitivity of the issues involved in the consideration
 - disclosure would be likely to inhibit frankness and candour in the making of communications
 - disclosure would lead to confusion having regard to possibilities discussed
 - disclosure of the documents would give merely a part explanation rather than a complete explanation for a particular decision
 - disclosure would undermine any processes of the agency
 - disclosure may inhibit robust and candid advice from public servants in the future

¹⁴ *Mildenhall v Department of Education* (1998) 14 VAR 87.

¹⁵ *Brog v Department of Premier and Cabinet* (1989) 3 VAR 201 at [208].

¹⁶ (1981) 1 AAR 1.

- disclosure may compromise the Government's ability to obtain access to information
- disclosure would reasonably be expected to prejudice the protection of an individual's right to privacy
- disclosure would reasonably be expected to prejudice an agency's ability to obtain similar information in the future.

34. However, the Agency also considered disclosure would promote the objects of the FOI Act, including to 'inform the community of the Government's operations, including, in particular, the policies, rules, guidelines, practices and codes of conduct followed by the Government in its dealings with members of the community'.

35. In determining whether disclosure of the document would be contrary to the public interest, I have considered the following relevant factors:¹⁷

- (a) the right of every person to gain access to documents under the FOI Act;
- (b) the degree of sensitivity of the issues discussed in the document and the broader context giving rise to the creation of the document; and
- (c) whether disclosure of the document would be likely to inhibit communications between Agency officers, essential for the Agency to make an informed and well-considered decision or participate fully and properly in a process in accordance with the Agency's functions and other statutory obligations.

36. I note the more sensitive or contentious the issues involved in a communication, the more likely a document may be exempt.¹⁸

37. The document subject to review under section 30(1) contains emails exchanged between Agency officers concerning a workplace issue or incident.

38. I accept the Agency's deliberative processes concerning the reporting of issues concerning interactions with parents and members of the public may require Agency officers to discuss relevant issues, or seek advice from within the Agency, before deciding on an appropriate response or action to be taken. In such circumstances, it is desirable for an Agency officer to be able to seek and exchange opinions and advice in an open, fulsome and constructive manner.

39. However, noting the sensitive personal affairs information I am satisfied is exempt under section 33(1), in relation to the remaining information to which the Agency relies on section 30(1), I consider this information on its own is administrative and general in nature. Accordingly, I do not consider disclosure of this information would be reasonably likely to deter senior Agency officers from reporting issues concerning interactions with parents or members of the public, or stifle internal Agency communications regarding such issues, in the future.

40. Accordingly, I am not satisfied section 30(1) applies to the remaining information in the document that I have determined is otherwise not exempt under section 33(1).

41. My decision in relation to section 30(1) is outlined in the Schedule of Documents in **Annexure 1**.

Deletion of exempt or irrelevant information

42. 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.

¹⁷ *Hulls v Victorian Casino and Gambling Authority* (1998) 12 VAR 483.

¹⁸ *Friends of Mallacoota Inc. v Department of Planning and Community Development* [2011] VCAT 1889 citing *Howard v the Treasurer of the Commonwealth* (1985) 3 AAR8169 at 177-8; *Thomas v The Department of Natural Resources and Environment* [2002] VCAT 553 at [27]; *Landes v VicRoads* [2009] VCAT 2403 at [47].

43. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'¹⁹ 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 25.²⁰
44. I have considered whether it is practicable to provide the Applicant with an edited copy of the document with irrelevant and exempt information deleted in accordance with section 25. I am satisfied it is practicable to do so, as it would not require substantial time and effort and the edited document would retain meaning.

Conclusion

45. On the information before me, I am satisfied certain information in the document is exempt under section 33(1).
46. However, I am not satisfied all information the Agency determined to be exempt under section 33(1) is exempt, or that section 30(1) applies to the remaining information in the document that I have determined is not otherwise exempt under section 33(1).
47. As I am satisfied it is practicable to provide the Applicant with an edited copy of the document with exempt and irrelevant information deleted, I have granted access to the document in part.
48. The Schedule of Documents in **Annexure 1** sets out my decision.

Review rights

49. If either party to this review is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.²¹
50. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.²²
51. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.²³
52. 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.
53. 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.²⁴

Third party review rights

54. If I determine to disclose the personal affairs information of a third party, which was originally exempted by an agency under section 33(1), if practicable, I must notify a third party of their right to apply to VCAT for review of my decision.²⁵

¹⁹ *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].

²⁰ *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].

²¹ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

²² Section 52(5).

²³ Section 52(9).

²⁴ Sections 50(3F) and (3FA).

²⁵ Sections 49P(5) and 50(3).

55. Having carefully considered notification in the circumstances of this matter, I have determined it is not practicable for me to notify the third parties about their review rights given the nature of the information I have determined to release to the Applicant, and my view that to do so could cause them unnecessary stress.
56. In any case, I note the Agency is at liberty to advise the relevant Agency officers of my decision and their right to seek review by VCAT of my decision and the release of their personal affairs information.
57. Accordingly, my decision does not take effect until the Agency's 14 day review period expires.

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
1.	[Date]	Emails	9	Released in part Sections 30(1), 33(1)	Release in part Section 33(1), 25 This document is to be released with the following irrelevant and exempt information deleted in accordance with section 25. <u>Irrelevant information</u> All names and telephone numbers (mobile and desk) on each page of the document. <u>Section 33(1)</u> The following information is exempt under section 33(1): <ul style="list-style-type: none"> • email addresses; • position titles; • the third line, following on from the subject line, on the top of page 1; • the second sentence in the paragraph following the 	Section 30(1): I am not satisfied the document contains information that is exempt under section 30(1) for the reasons in the Notice of Decision above. Section 33(1): I am satisfied the document contains certain information that is exempt under section 33(1) for the reasons in the Notice of Decision above. Section 25: During the review, the Applicant advised they do not seek review of the names and telephone numbers of third parties. This information is irrelevant and is to be deleted in accordance with section 25. I am satisfied it is practicable to provide the Applicant with an edited copy of the document with exempt and irrelevant information deleted in accordance with section 25.

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
					<p>greeting in the email dated [date and time] on pages 1, 2, 5, 6, 8 and 9; and</p> <ul style="list-style-type: none"> • the first sentence following the greeting in the email dated [date and time] on pages 2, 4, 8 and 9. 	