

## Notice of Decision and Reasons for Decision

---

Applicant:	'CP4'
Agency:	Department of Premier and Cabinet
Decision date:	29 January 2021
Exemption and provision considered:	Sections 25A(5), 33(1) 'CP4' and Department of Premier and Cabinet ( <i>Freedom of Information</i> ) [2021] VICmr 30 (29 January 2021)
Citation:	

---

FREEDOM OF INFORMATION – refusal to process request on grounds all documents, should any exist, would be exempt – disclosure of personal affairs information – not satisfied all documents would be exempt

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

29 January 2021

## Reasons for Decision

### Background to review

1. The Applicant made a request to the Agency for access to the following documents:
  1. Documents referring or relating to [named person's] recruitment to employment within your Department including but not limited to:
    - a. [Named person's] CV/Resume
    - b. Notes from [named person's] interviews; and
    - c. Documents recording the decision to recruit [named person].
  2. Confirmation of the total salary and wages paid to [named person] for each of the years [they were] employed in your Department (i.e. Year ending [specified date and year] \$50,000...).
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 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.
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 its 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 section 33(1). The Agency was invited to provide a further submission or consider making a fresh decision under section 49M.
9. On the same day, the Agency responded and sought further information in relation to OVIC's preliminary view.
10. On [date], the Agency was provided with further information in relation to OVIC's preliminary view. OVIC staff advised documents, such as the job advertisement, would be captured as part of the terms of the FOI request and would not be exempt in full under section 33(1).

11. On [date], the Agency disagreed with OVIC's preliminary view and submitted documents such as the job advertisement and position description would not fall within the scope of the Applicant's request. Further, the Agency declined to make a fresh decision under section 49M.

#### **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. The Supreme Court of Victoria has held the power to refuse an FOI request under this provision will apply in limited circumstances where each of the following three elements are met:
  - (a) Based on the description of documents, as requested in the FOI request, the decision maker must work out the inherent or essential quality or character of the requested documents.
  - (b) The decision maker must determine whether each of the documents, as described by the Applicant, would be exempt. It must be apparent that all documents would exempt.
  - (c) From the face of the FOI request or the Applicant's agreement, there must be no scope for the agency to provide an edited copy of any of the documents.<sup>1</sup>

#### ***What is the essential character of the documents requested?***

14. I am satisfied the nature or character of the requested documents, as described in the Applicant's FOI request, is apparent from the terms of their request, being documents relating to a third party's recruitment and subsequent employment with the Agency.
15. As noted above, the Agency was provided with my preliminary view that documents such as a job advertisement would fall within the terms of the Applicant's request.

16. The Agency did not agree with the preliminary view and responded:

The terms of the request specifically seek 'documents referring or relating to [named person's] recruitment to employment...'. The job advertisement would have been created prior to [named person's] employment by the department and does not relate to [their] recruitment but rather a vacant role in the department. Should this argument be extended to [named person's] position description, [the Agency] again contends that this document would not relate to [named person's] recruitment, but rather the scope of [their] duties while employed by the department.

It is clear on the face of the terms used by the applicant (specifically 'relating to [named person's] recruitment to employment') that the applicant seeks documents specific to [named person]. [The Agency's] view is that it therefore follows that all of the documents relevant to these terms would relate to [named person's] personal affairs information and therefore be exempt pursuant to section 33(1) of the Act.

17. I have considered the Agency's position and agree it is likely certain documents captured by the Applicant's request would be exempt under section 33(1). However, I do not agree documents, such as the position description and job advertisement fall outside the terms of the Applicant's request as, in my view, such documents directly relate to the recruitment process and employment terms and would be captured by the broad terms of the Applicant's request as these represent documents

---

<sup>1</sup> *Knight v Corrections Victoria* [2010] VSC 338.

‘referring or relating to the third party’s recruitment to employment’. 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 FOI Act.

***Would each of the requested documents, as described in the FOI request, 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 33(1).

***Application of section 33(1)***

19. 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>2</sup> and
  - (b) such disclosure would be ‘unreasonable’.
20. 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.<sup>3</sup>
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 (a **third party**), in the circumstances.

**Would the requested documents contain personal affairs information?**

22. Based on the terms of the Applicant’s request, I am satisfied there would likely be personal affairs information of third parties in one or more of the requested documents.

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

23. The concept of ‘unreasonable disclosure’ involves determining whether the public interest in disclosure of official information is outweighed by the interest in protecting a third party’s right to personal privacy in the circumstances.
24. The Victorian 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’.<sup>4</sup> 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’.<sup>5</sup>
25. I also note *Coulson v Department of Premier and Cabinet*,<sup>6</sup> in which the Victorian Civil and Administrative Tribunal (VCAT) held 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>2</sup> Sections 33(1) and (2).

<sup>3</sup> Section 33(9).

<sup>4</sup> *Victoria Police v Marke* [2008] VSCA 218 at [76].

<sup>5</sup> *Victoria Police v Marke* [2008] VSCA 218 at [79].

<sup>6</sup> *(Review and Regulation)* [2018] VCAT 229.

26. I accept the Applicant is likely aware of the identity of one or more of the 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.<sup>7</sup>
27. I am satisfied it would be unreasonable to release certain personal affairs information of a third party that would likely be contained in the documents, where the information is sensitive and personal in relation to their recruitment and employment.
28. However, I am not satisfied it would be unreasonable to release documents such as the job advertisement and position description where those documents are likely to contain limited, if any, personal affairs information of the third party.
29. 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.
30. For the above reasons, I am not satisfied all personal affairs information in the requested documents, should any exist, would be exempt under section 33(1).

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

31. 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.
32. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'<sup>8</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>9</sup>
33. Having considered the particular circumstances of this matter, I am satisfied there would likely be scope 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 to do so as it would likely not require substantial time and effort, and the edited documents would likely retain sufficient meaning.
34. Accordingly, I am not satisfied the requirement under section 25A(5) for there to be no scope to provide the Applicant with edited copies of any of the documents is met in this case.

## **Conclusion**

35. 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.
36. 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).

---

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

<sup>8</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>9</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].

37. 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.
38. 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.
39. 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**

40. If either party to this review is not satisfied with my decision, they are entitled to apply to the VCAT for it to be reviewed.<sup>10</sup>
41. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.<sup>11</sup>
42. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.<sup>12</sup>
43. 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.
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.<sup>13</sup>
45. If a review application is made to VCAT, my decision will be subject to any VCAT determination.

---

<sup>10</sup> The Applicant in section 50(1)(b) and the Agency in section 50(3D).

<sup>11</sup> Section 52(5).

<sup>12</sup> Section 52(9).

<sup>13</sup> Sections 50(3F) and (3FA).