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Information Commissioner

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Notice of Decision and Reasons for Decision

Applicant:	'CO2'
Agency:	Swinburne University of Technology
Decision date:	22 January 2021
Exemption considered:	Section 33(1)
Citation:	'CO2' and Swinburne University of Technology (<i>Freedom of Information</i>) [2021] VICmr 19 (22 January 2021)

FREEDOM OF INFORMATION – personal affairs information – personal affairs of agency officers – unreasonable disclosure – approval documentation – course withdrawal

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.

My decision on the Applicant's request is the same as the Agency's.

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

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

My reasons for decision follow.

Sven Bluemmel

Information Commissioner

22 January 2021

Reasons for Decision

Background to review

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

University or course withdrawal approval documentations from the first approver to the last approver be it in the computer system or emails or on papers or any other workflow applications used by the [Agency] in processing university or course withdrawal approval.
2. In its decision, the Agency identified two documents falling within the terms of the Applicant's request. It decided to grant access to one of those documents in full and one in part under section 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. I have examined copies of the document subject to review.
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 considered all communications received from the parties, including:
 - (a) the Agency's decision on the FOI request;
 - (a) information provided with the Applicant's review application; and
 - (b) information provided by the Applicant and Agency during 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.

Applicant's concerns regarding adequacy of search and missing documents

9. Alongside their review application, the Applicant made a complaint to OVIC under section 61A(1)(a) of the FOI Act on grounds the Agency failed to conduct a thorough and diligent search for documents.
10. In accordance with section 61B(3), OVIC determined to address these concerns as part of this review.
11. OVIC made inquiries with the Agency regarding the Applicant's concerns.
12. Based on subsequent telephone communications between OVIC staff and the Applicant to clarify these issues and discuss our findings, I am satisfied the Agency undertook a thorough and diligent search for documents using appropriate search terms of relevant systems. There is no information before me to suggest the Agency conducted its searches in a manner that would limit the discovery

of relevant documents captured by the terms of the Applicant's request. As such, I am satisfied OVIC has pursued the Applicant's concerns appropriately.

Review of exemption

Section 33(1)

13. 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 the 'personal affairs information' of individuals other than the Applicant?

14. 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
15. 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
16. 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?

17. 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 particular circumstances.
18. I adopt the view expressed by the Victorian Court of Appeal in *Victoria Police v Marke*,⁴ 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'.⁵
19. 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.⁶ Therefore, it is necessary to consider 'all matters relevant, logical and probative to the existence of conditions upon which the section is made to depend'.⁷

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 [2008] VSCA 218 at [76].

⁵ [2008] VSCA 218 at [79].

⁶ *Coulson v Department of Premier and Cabinet (Review and Regulation)* [2018] VCAT 229.

⁷ [2008] VSCA 218 at [104].

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

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

The personal affairs information in the document includes names and direct contact information of Agency officers. This information was acquired by the Agency in the course of the Agency officers' usual work duties and responsibilities.

Given the subject matter of the Applicant's request I accept the identity of the third parties may be known to the Applicant. However, even where an applicant claims to know the identity of a third party, disclosure of their personal affairs information may still be unreasonable in the circumstances.⁸

Determining whether the personal affairs information of an agency officer is exempt under section 33(1) must be considered in the context of the particular circumstances of each matter.⁹ In my view, subject to special circumstances, there is nothing particularly sensitive about matters occurring or arising out of the course of an agency officer's professional duties or work responsibilities as a public servant.¹⁰

In this case, having considered the circumstances in which the information was obtained, the subject matter of the Applicant's FOI request, the Agency's decision and its submissions, I am satisfied the personal affairs information in the document is sensitive.

(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.¹¹

I acknowledge the Applicant seeks access to the document for the purpose of pursuing [further action] against the Agency. While I consider that release of the document may contribute to the Applicant's purpose, I am not persuaded that release of the personal affairs information would necessarily make any further contribution to this purpose.

(c) The likelihood of further disclosure of 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.¹²

I have considered the likelihood of the personal affairs information in the document being further disseminated and the effects broader disclosure of this information would have on the privacy of the relevant third parties.

In the circumstances, I am satisfied it is reasonably likely the Applicant would disseminate the document further, if released in full.

⁸ *AB v Department of Education and Early Childhood Development* [2011] VCAT 1263 at [58]; *Akers v Victoria Police* [2003] VCAT 397.

⁹ *Coulson v Department of Premier and Cabinet (Review and Regulation)* [2008] VCAT 229.

¹⁰ *Re Milthorpe v Mt Alexander Shire Council* (1997) 12 VAR 105.

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

¹² *Victoria Police v Marke* [2008] VSCA 218 at [68].

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

Having reviewed the document, I note the Agency has disclosed all substantive information except for the personal affairs information in the document.

The Applicant has not provided any information as to any public interest that would be promoted by release of the personal affairs information in the document.

In the circumstances, I am not satisfied there is a broader public interest that would be promoted by disclosure of the personal affairs information of the third parties in this instance.

Rather, I consider the Applicant's interest in the information would serve a personal interest only.

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

There is no specific information before me regarding the views of third parties regarding the release of their personal affairs information.

While I do not have information before me as to the views of each third party, in the context of this matter, I am satisfied it is reasonably likely the Agency officers would not consent to the release of their personal affairs information.

(f) Whether the disclosure of information would, or would be reasonably likely to endanger the life or physical safety of any person¹³

I am also required under section 33(2A) to consider whether disclosure of the personal affairs information would, or would be reasonably likely, to endanger the life or physical safety of any person. The term 'any person' is broad and extends to any relevant endangerment involving the safety of an applicant, a related third party or any other person.

In considering this factor, I note the Victorian and Civil Administrative Tribunal (**VCAT**) has held physical safety is not concerned solely with actual safety, but also with the perception of the relevant person as to whether he or she is safe.¹⁴ Similarly, VCAT has found the maker of the documents in question may have a perception of fear if their personal information were disclosed.¹⁵

Having reviewed the Agency's submission, I consider this is a relevant factor when assessing the release of personal affairs information to the Applicant.

I have also taken into consideration the Applicant did not provide any reason for seeking access to the personal affairs information of Agency officers and other persons named in the document such that any such reason could be balanced with the concerns raised.

21. Having weighed up the above factors, on balance, I am satisfied disclosure of the personal affairs information of third parties in the document would be unreasonable. Accordingly, I am satisfied it is exempt under section 33(1).

¹³ Section 33(2A).

¹⁴ *O'Sullivan v Police (Vic)* (2005) 22 VAR 426; [2005] VCAT 532 at [19].

¹⁵ *Morse v Building Appeals Board (No 2)* [2007] VCAT 2344 at [15].

Deletion of exempt or irrelevant information

22. 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.
23. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'¹⁶ 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 25.¹⁷
24. I have considered whether it would be practicable to provide the Applicant with an edited copy of the document in accordance with section 25. I am satisfied it would be practicable to provide an edited copy of the document as the Agency has already done so.

Conclusion

25. On the information before me, I am satisfied the personal affairs information in the document is exempt under section 33(1).
26. In relation to providing an edited copy of the document in accordance with section 25, I am satisfied it is practicable to delete the exempt information in the document and access is granted in part.
27. Accordingly, my decision in this matter is the same as the Agency's decision.

Review rights

28. If they are not satisfied with my decision, the Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹⁸
29. 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.
30. The Agency is required to notify the Information Commissioner in writing as soon as practicable if an application to VCAT for a review of my decision is made.¹⁹
31. If an application is made to VCAT, my decision will be subject to any VCAT determination.

When this decision takes effect

32. My decision does not take effect until the Applicant's review period (stated above) expires. If a review application is made to VCAT, my decision will be subject to any VCAT determination.

¹⁶ *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].

¹⁷ *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].

¹⁸ Section 52(5).

¹⁹ Sections 50(3F) and (3FA).