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Notice of Decision and Reasons for Decision

Applicant:	Regional Victorians Opposed to Duck Shooting Inc.
Agency:	Department of Jobs, Precincts and Regions
Decision date:	29 January 2021
Exemptions considered:	Sections 33(1), 35(1)(b)
Citation:	<i>Regional Victorians Opposed to Duck Shooting Inc. and Department of Jobs, Precincts and Regions (Freedom of Information)</i> [2021] VICmr 23 (29 January 2021)

FREEDOM OF INFORMATION – wildlife – recreational duck shooting – lobbying – correspondence to Members of Parliament

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, however, I have not decided to release additional information in the documents.

I am satisfied certain information in the documents is exempt under section 33(1). However, I am satisfied information the Agency exempted under section 35(1)(b) is exempt under section 33(1).

Noting the Agency released the documents with irrelevant and exempt information deleted in accordance with section 25, I am satisfied it is practicable to provide the Applicant with an edited copy of those documents.

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 seeking access to:

... copies of correspondence including emails and letters to the [named department] to [a named Member of Parliament] or [their] office/advisors/staff regarding duck shooting.

I seek correspondence within a date range of [date range].
2. The Agency identified 20 documents falling within the terms of the Applicant's request and released 14 documents in part and refused access to six documents in full, with information exempted under sections 33(1) and 35(1)(b). 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. During the review, the Applicant indicated they do not seek review of names, addresses, email addresses and telephone numbers in the documents.
5. I have examined copies of the documents 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 submissions 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 also 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 35(1)(b) first, followed by section 33(1).

Section 35(1)(b)

11. A document is exempt under section 35(1)(b) if two conditions are satisfied:
 - (a) disclosure would divulge information or matter communicated in confidence by or on behalf of a person or a government to an agency or a Minister; and
 - (a) disclosure would be contrary to the public interest as it would be reasonably likely to impair the ability of an agency or a Minister to obtain similar information in the future.
12. In summary, section 35(1)(b) is concerned with protecting the public interest in the free flow of information provided in confidence between an individual and an agency.

Was the information or matter communicated in confidence?

13. Whether information communicated by an individual was communicated in confidence is a question of fact.¹
14. A document does not need to be marked 'confidential' for its contents to be considered to have been communicated in confidence.² Confidentiality can be express or implied from the circumstances of a matter.³
15. When determining whether information was communicated in confidence, it is necessary to consider the position from the perspective of the communicator.⁴
16. The Agency advised it did not consult with third parties to obtain their view as to whether the information was communicated in confidence and whether the information should be disclosed to the Applicant.
17. The information the Agency determined is exempt under section 35(1)(b) is correspondence from private third parties to Members of Parliament lobbying for law reform with respect to duck shooting.
18. In my view, members of the public, who write to a Member of Parliament in a private capacity, in relation to an issue of personal interest do so with an expectation the relevant Member of Parliament and their staff will have access to their correspondence only. I am not satisfied members of the public would reasonably expect their correspondence would be widely distributed, particularly to unrelated third parties, where it includes details of their private lives.
19. On balance, I am satisfied most of the information subject to review was communicated with an expectation of confidentiality.

Would disclosure be contrary to the public interest as it would be reasonably likely to impair the ability of the Agency to obtain similar information in the future?

20. The second condition requires I must be satisfied, if the information were to be disclosed, it would impair the ability of the Agency to obtain similar information in the future. For example, others in the position of the communicator or communicators would be reasonably likely to not provide similar information to the Agency in the future.
21. I note the exemption will not be made out if the impairment in obtaining similar information would go no further than potential providers of the information may be less candid than they would otherwise have been.⁵
22. Therefore, the public interest test in section 35(1)(b) is narrow. It is directed towards the impact release would have on an agency's ability to obtain the same type of information in the future. The exemption does not permit me to have regard to other matters, such as any public interest in favour of release, or the extent to which the Applicant's personal interest in the document would be served by granting access to the documents.
23. I am not satisfied disclosure of the documents would inhibit members of the public from writing to a Member of Parliament about personal and/or private issues of concern. Rather, I consider disclosure

¹ *Ryder v Booth* [1985] VR 869 at [883]; *XYZ v Victoria Police* [2010] VCAT 255 at [264].

² *Williams v Victoria Police* [2007] VCAT 1194 at [75].

³ *Ibid.*

⁴ *Ibid.*, *XYZ* at [265].

⁵ *Smeaton v Victorian WorkCover Authority* [2012] VCAT 1549, approving *Birnbauer v Inner and Eastern Health Care Network* [1999] 16 VAR 9.

of the documents may result in members of the public providing less detail about personal and/or private issues of concern when communicating with Members of Parliament.

24. Accordingly, I am satisfied information in the documents is not exempt under section 35(1)(b).

Section 33(1)

25. 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;⁶ and
- (b) such disclosure would be 'unreasonable'.

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

26. 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.⁷
27. 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.⁸
28. As noted above, the Applicant does not seek review of the names, addresses, email addresses or telephone numbers of individuals.
29. In undertaking a review under section 49F, I am required by section 49P to make a fresh or new decision. This means my review does not involve determining whether the Agency's original decision is correct, but rather I am required to ensure my fresh decision is the 'correct and preferable decision'.⁹ This involves ensuring my decision is correctly made under the FOI Act and any other relevant applicable law in force at the time of my decision.
30. I have considered the contents of the correspondence exempted by the Agency under section 35(1)(b). In my view, it contains information concerning the private lives of individuals as well as their personal opinions regarding duck shooting. I consider this information is personal affairs information for the purposes of section 33(1).
31. Accordingly, it is necessary to consider whether disclosure of the personal affairs information in the documents would be unreasonable.

Would disclosure of the personal affairs information be unreasonable?

32. 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.
33. I adopt the view expressed by the Victorian Court of Appeal in *Victoria Police v Marke*,¹⁰ in which it was held there is 'no absolute bar to providing access to documents which relate to the personal

⁶ Sections 33(1) and (2).

⁷ Section 33(9).

⁸ *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].

⁹ *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577 at 591.

¹⁰ [2008] VSCA 218 at [76].

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 [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'.¹¹

34. In determining whether disclosure of the personal affairs information would be unreasonable in these circumstances, I have considered the following factors:

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

The documents subject to review is correspondence from private third parties and organisations to Members of Parliament seeking law reform with respect to duck shooting. Some of the correspondence has a related 'correspondence action sheet' attached, which is an administrative document completed by an Agency officer and referring the third party's correspondence to the relevant Minister.

Correspondence sent by private individuals were exempted in full by the Agency. The Agency released most of the content in correspondence sent by organisations, except for personal identifying information such as the names, signatures, and position titles of individuals.

With respect to correspondence sent by private individuals, the nature of the personal affairs information differs in each document. Certain correspondence is highly personal in nature, such that it contains personal information about the private lives of the third parties. Whereas, other correspondence contains minimal identifying information except for personal opinions regarding duck shooting and an individual's contact details.

(b) 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.¹²

In support of its review, the Applicant submits:

Before the last shooting season, [named Member of Parliament] refused to sign off on allowing it to proceed due to the worst environmental conditions ever recorded. Country Labor voted to ban duck shooting and many Labor MPs publicly stated they want to ban duck shooting for cruelty reasons In fact at their last years state conference, the Labor party itself voted almost unanimously to review the policy on duck shooting in our state.

However nothing has been done about it and [named Members of Parliament] allowed the shooting to proceed, despite limited compliance activities due to Covid 19.

The public have a right to know why [named Members of Parliament] persist in allowing duck shooting despite the cruelty, the adverse impacts to community and the fact the majority of Victorians including their own party are opposed.
[...]

¹¹ [2008] VSCA 218 at [79].

¹² *Victoria Police v Marke* [2008] VSCA 218 at [104].

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

I acknowledge the Applicant's strong interest in obtaining access to the documents and the public interest in disclosure of information relating to duck shooting. However, the documents do not disclose information relating to the government's stance with respect to duck shooting or its response to those individuals who wrote to the Members of Parliament raising their personal concerns and opinions.

While I acknowledge the Applicant's views in relation to their opposition of duck shooting, and their view that the majority of Victorians are opposed to duck shooting, I do not consider there would be a public interest in disclosing copies of correspondence sent by private individuals to Members of Parliament containing their personal concerns and opinions in relation to duck shooting.

(d) 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.¹³ 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.¹⁴

In this matter, the Agency did not consult with third parties to obtain their views on disclosure of their personal affairs information as it did not have sufficient details to contact all the third parties and due to administrative constraints caused by staff working remotely during the COVID-19 pandemic.

Having reviewed the documents and considered the circumstances in which they were obtained by the Agency, I consider third parties who would not expect their correspondence to be provided to an unrelated third party. As such, I consider it is reasonably likely those individuals, who wrote to the Members of Parliament raising their personal concerns and opinions, would object to the disclosure of their personal affairs information in the documents.

(e) 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.¹⁵ Accordingly, I must consider the likelihood and potential effect of further dissemination of a third party's personal affairs information, if released.

There is no information before me concerning the Applicant's intended use for the documents. However, having considered the circumstances in which the Agency obtained the personal affairs information and the nature of the information, I consider the protection of the privacy of the individuals who wrote to the Members of Parliament outweighs the Applicant's interest in obtaining access to the documents.

¹³ Section 33(2B).

¹⁴ Section 33(2C).

¹⁵ *Victoria Police v Marke* [2008] VSCA 218 at [68].

- (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 the personal affairs information would be unreasonable, I am required to take into account whether or not its disclosure would be reasonably likely to endanger the life or physical safety of any person.¹⁶ I do not consider this to be a relevant factor in circumstances of this matter.

35. On consideration of the above factors, I am satisfied it would be unreasonable to disclose correspondence sent by private individuals to Members of Parliament containing their personal concerns and opinions in relation to duck shooting.
36. With respect to the remaining personal affairs information in the documents, which includes initials of Agency officers, and signatures and position titles of persons representing organisations who sent correspondence to Members of Parliament, I am satisfied disclosure of this information would not assist the Applicant with the purpose to which they seek access to the documents or provide them with further understanding of the documents. As such, I am satisfied disclosure of this information would be unreasonable in the circumstances.
37. Accordingly, I am satisfied information in the documents is exempt under section 33(1).

Deletion of exempt or irrelevant information

38. 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.
39. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'¹⁷ 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 25.¹⁸
40. As stated above, the Applicant does not seek access to names, addresses, email addresses and telephone numbers, such information is irrelevant to the scope of this review.
41. Noting the Agency released the documents with irrelevant and exempt information deleted in accordance with section 25, I am satisfied it is practicable to provide the Applicant with an edited copy of those documents.

Conclusion

42. I am satisfied certain information in the documents is exempt under section 33(1). However, I am satisfied information the Agency exempted under section 35(1)(b) is exempt under section 33(1).
43. Noting the Agency released the documents with irrelevant and exempt information deleted in accordance with section 25, I am satisfied it is practicable to provide the Applicant with an edited copy of those documents.
44. Accordingly, I have not released additional information to the Applicant.

¹⁶ Section 33(2A).

¹⁷ *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].

¹⁸ *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].

Review rights

45. If the Applicant to this review is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.¹⁹
46. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.²⁰
47. 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.
48. The Agency is required to notify the Information Commissioner in writing as soon as practicable if an application is made to VCAT for a review of my decision.²¹
49. If a review application is made to VCAT, my decision will be subject to any VCAT determination.

¹⁹ Section 50(1)(b).

²⁰ Section 52(5).

²¹ Sections 50(3F) and (3FA).