

Notice of Decision and Reasons for Decision

Applicant:	'DO6'
Agency:	Department of Jobs, Precincts and Regions
Decision date:	27 August 2021
Exemption considered:	Section 33(1)
Citation:	'DO6' and Department of Jobs, Precincts and Regions (Freedom of Information) [2021] VICmr 259 (27 August 2021)

FREEDOM OF INFORMATION – gift register – Australian Open complimentary tickets – State government invitees – personal affairs information – not unreasonable to disclose

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 information in the document is not exempt under section 33(1).

My reasons for decision follow.

Sven Bluemmel
Information Commissioner

27 August 2021

Reasons for Decision

Background to review

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

...I seek documents detailing State Government invitees to the 2021 Australian Open, how many people were invited, their names and the organisations they represent and by whom they were hosted.
2. In its decision, the Agency identified one document falling within the terms of the Applicant's request. The Agency relied on the exemption in section 33(1) to refuse access to the document in part. The Agency's decision letter sets out the reasons for its decision.

Review application

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 a copy 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 and submissions received from the parties.
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 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

Section 33(1) – documents affecting personal privacy

9. 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 (a **third party**);¹ and
 - (b) such disclosure would be 'unreasonable'.

Does the document contain the personal affairs of a third party?

10. A document will disclose personal affairs information if it 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.²

¹ Sections 33(1) and (2).

² *Hanson v Department of Education & Training* [2007] VCAT 123.

11. I am satisfied the exempted information is personal affairs information for the purposes of section 33(1), being names of third parties.

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

12. The concept of 'unreasonable disclosure' involves balancing the public interest in the disclosure of official information with the protection of a third party's right to privacy in the particular circumstances.
13. In its submissions, the Agency state:

VPS Executive and Non-Executive Employees

The names of all executive in DJPR and other Victorian State Government agencies were released.

In line with previous [Victorian Civil and Administrative Tribunal] VCAT decisions such as *Smeaton v Victorian Workcover Authority (General) [2012] VCAT 1549 (29 October 2012)*, the names of agency staff under VPS 6 level have been redacted under s33(1). I considered these redactions appropriate as the individuals concerned were not in attendance as part of their roles as public sector.

Non-VPS Individuals

In assessing personal information relating to non-VPS offices, the FOI unit searched databases (internal directory, online searches) to establish whether individuals were publicly linked to organisation their name appeared with in the document. These checks were undertaken for every individual not a VPS officer.

...

Where an individual was not connected in the public domain to the organisation against which their name is listed in the document, the name was redacted.

I was advised that invitations were directed to a named individual 'and guest' in some instances, and that these individuals were either family members or personal guests of invitees. I was further advised that in some cases, an invitee would be provided with a 'plus one' ticket which was then provided to a third party not directly invited by DJPR. I considered it unreasonable to release these individuals' names for the following reasons;

- They are not connected professionally or personally to DJPR or its entities and it is unreasonable to release personal information that may suggest otherwise.
- As private citizens it would be unreasonable to release personal information which would not be expected by the individual and could cause distress.
- A private connection to senior government officials, does not make release of such information reasonable and could raise security concerns in relation to that individual.

14. In *Victoria Police v Marke*,³ the Victorian Court of Appeal 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'.
15. This involves having regard to any matter that may 'relevantly, logically, and probatively' bear upon whether disclosure of personal affairs information of any person would be unreasonable in its own context.⁴

³ [2008] VSCA 1653 at [42].

⁴ Ibid at [98].

16. The Court further held, '[t]he protections 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
17. For the following reasons, I have determined it would not be unreasonable to disclose the personal affairs information in the document:
- (a) Broadly, I agree that consistent with the VCAT decision in *Coulson v Department of Premier and Cabinet (Coulson decision)*,⁶ whether an agency officer's personal affairs information is exempt under section 33(1) must be considered in the context of each matter.
 - (b) Generally, I accept non-executive agency officers are unlikely to have authority to act on behalf of the agency and be accountable for its decision making and, therefore, should not necessarily be subject to the same level of public scrutiny as more senior agency officers. However, while the seniority of agency officers is a relevant consideration, this consideration is not determinative.
 - (c) Subject to an agency demonstrating special circumstances apply, I consider it would not be unreasonable to disclose certain personal details of individuals such as a name or position title, regardless of their seniority, where a document sought is an official document of an agency and merely records either: an agency officer carrying out their usual employment duties or demonstrates an agency's responsibilities in accordance with public sector codes, conduct and practices.
 - (d) I also consider this notion of 'official duties and responsibilities' extends to public sector staff whose positions, at times, provide for opportunities to attend public events. In this case, being offered a ticket to attend a sporting event, which is received in affiliation with one's professional role. This is in contrast to being the recipient of a gift received in connection with one's private life. Therefore, I consider the personal affairs information of public sector staff named in the document is recorded in the context of their professional roles, rather than in their personal or private capacity.
 - (e) In relation to individuals who are not public sector employees, while it may impact the privacy of the relevant third parties, as considered above, the personal affairs information is not particularly sensitive. On the information before me, I do not consider these individuals would be subject to any adverse criticism or scrutiny, nor do I consider disclosure would, or would be reasonably likely to, endanger the life or physical safety of any person.
 - (f) Lastly, I consider the Applicant's interest in the personal affairs information would serve a broader public interest. Specifically, there is an overarching public interest in transparent and accountable practices of the public sector and the public confidence that resources are being utilised responsibly and appropriately. This is also reflected in policies for the Victorian public sector on giving and receiving of gifts, benefits and hospitality, which promotes accountability through the management and publication of an agency's gift register.
 - (g) In this case, I am of the view that disclosure of the personal affairs information in the document would, if anything, increase the quality of information available to the public, which is supported by public sector polices and codes of conduct. Therefore, disclosure of document can be said to serve the public interest in promoting open and accountable actions of the public sector.
18. Having weighed up the above factors, I have determined the personal affairs information of third parties named in the document is not exempt under section 33(1).

⁵ Ibid at [79].

⁶ [2018] VCAT 229.

Conclusion

19. On the information available, I am satisfied the document is not exempt under section 33(1).

Review rights

20. If either party to this review is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.⁷
21. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.⁸
22. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.⁹
23. 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.
24. 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.¹⁰

Notification of third party review rights

25. I have decided to release a document that contains the personal affairs of third parties.
26. Where practicable, the relevant third party will be notified of my decision and is entitled to apply to VCAT for a review within 60 days from the date they are given notice.
27. My decision does not take effect until this relevant 60 day review period (stated above) expires. If a review application is made to VCAT, my decision will be subject to any VCAT determination.

⁷ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

⁸ Section 52(5).

⁹ Section 52(9).

¹⁰ Sections 50(3F) and (3FA).