

Notice of Decision and Reasons for Decision

Applicant:	'DT5'
Agency:	Department of Education and Training
Decision date:	11 October 2021
Exemption considered:	Section 33(1)
Citation:	'DT5' and Department of Education and Training (Freedom of Information) [2021] VICmr 303 (11 October 2021)

FREEDOM OF INFORMATION – primary school photograph – students – children – personal affairs
information of third parties – disclosure unreasonable

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 is the same as the Agency's decision.

I am satisfied the document subject to review is exempt from release under section 33(1).

As I am satisfied it is not practicable to delete exempt information in the document in accordance with section 25, access to the document is refused in full.

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner

11 October 2021

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency seeking access to the following documents:
 - The [third party] classes that contain the names of the students for classes from [various dates];
 - A copy of yearbook from [third party] that contains the names of the students for classes from [date];
 - Any documentation relating to any complaints [Applicant] made to the [Agency] between [dates];
 - Any documentation relating to any complaints [Applicant] made to the [third party] between [dates];
 - Any documentation relating to any phone calls [Applicant] made to the [Agency] between [dates]; and
 - Any documentation relating to any phone calls [Applicant] made to the [third party] between [dates].
2. Following consultation with the Agency, the Applicant clarified the terms of their request as follows:
 - The [third party] class photos that contain the names of students in the class from [various dates];
 - A copy of a yearbook from the [third party] that also contains the names of the students for classes from [various dates].
3. The Agency identified four documents comprising 25 photographs falling within the terms of the Applicant's request and granted access to three documents in full and refused access to one document in full under section 33(1).
4. The Agency's decision letter sets out the reasons for its decision.

Review

5. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access to one document.
6. I have examined a copy of the document subject to review. I have also reviewed a copy of the documents released to the Applicant.
7. The document subject to review contains class photographs of students in [specified class levels] between the years [year] to [year] at a primary school. The photographs also feature Agency teaching staff for the relevant grades. The Applicant is not present in the photographs subject to review nor named in those photographs. However, the Applicant is present as a student in other documents containing class photographs that the Agency disclosed to the Applicant.
8. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
9. I have considered all communications and submissions received from the parties.
10. 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.

11. 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.

Complaint concerning adequacy of document searches

12. During the review, the Applicant raised concerns about the adequacy of the Agency's document searches. In accordance with section 61B(3), these concerns were addressed as part of this review.
13. OVIC staff made further enquires with the Agency to address the Applicant's concerns. The outcome of those enquires was communicated to the Applicant.
14. Based on the Agency's response, I am satisfied the Agency undertook a thorough and diligent search for the requested documents. Accordingly, I consider the Applicant's complaint has been fully pursued and there is no basis for the making of further inquiries or the taking of further action under the FOI Act.

Review of exemptions

Section 33(1) – Personal affairs information of a third party

15. A document is exempt under section 33(1) if two conditions are satisfied:
 - (a) disclosure of the document 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 personal affairs information of a third party?

16. 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
17. 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
18. As stated above, the document subject to review contains class photographs of students and Agency teaching staff at a primary school. The Applicant is not present in the photographs nor are they named in the document.
19. I am satisfied the document contains the personal affairs information of third parties for the purposes of section 33(1).

¹ Sections 33(1), 33(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].

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

20. In determining whether a document is exempt from release under section 33(1), it is also necessary to determine whether disclosure of a third party's personal affairs information in a document would be unreasonable in the circumstances.
21. The concept of 'unreasonable disclosure' involves balancing the public interest in the disclosure of official information with the interest in protecting an individual's right to personal privacy in the circumstances.
22. In *Victoria Police v Marke*,⁴ the Victorian Court of Appeals held there is 'no absolute bar to providing access to documents which relate to the personal affairs of others'. Further, 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'.
23. In determining whether disclosure of the third parties' 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 it was obtained

As discussed above, the document is a class photograph of students and Agency teaching staff at a primary school.

The Applicant submits they are featured in the document. However, as stated above, having reviewed the document, including the list of names of persons appearing in the photographs, I confirm the Applicant is not present nor are they named in the photographs.

Even in circumstances where a person named or identified in a document is known to an applicant, it may still be unreasonable to release their personal affairs information under the FOI Act.⁵

Class photographs are commonly taken in schools and are usually paid for and purchased by parents as a personal record of their child's attendance at school. They are generally not publicly available.

I consider the images of children in a document held by the Agency, in which an applicant is not present, is personal and sensitive information in respect to those children even where they would now be adults.

The document also contains the images of Agency teaching staff and their names.

It is clear from the documents identified by the Agency in response to the Applicant's request that it holds a copy of class photographs in its school records.

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

There is no information before me concerning the views of the relevant third parties as to the release of their personal affairs information in the document, as the Agency determined

⁴ [2008] VSCA 218 at [76]

⁵ *AB v Department of Education and Early Childhood Development* [2011] VCAT 1263 at [58]; *Akers v Victoria Police* [2003] VCAT 397.

consultation was not practicable on grounds consultation would be likely to cause those persons undue stress or would otherwise be unreasonable.

Having reviewed and considered the nature of the document, I am satisfied it is reasonably likely the third parties would object to disclosure of their personal affairs information in the document under the FOI Act.

(c) 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 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 reasonable.⁶

In their correspondence with OVIC, the Applicant makes a number of allegations regarding Agency staff and/or students. The Applicant also submits they seek access to the documents for potential litigation and evidentiary purposes. Having reviewed the Applicant's submission and correspondence, I find the allegations are serious in nature.

In response, the Agency submits the Applicant has raised unsubstantiated allegations against the Agency, the relevant primary school, teaching staff and students for a number of years. [Further background redacted].

While I acknowledge the Applicant's stated interest in obtaining access to the document and the seriousness of the allegations, I am unable to determine on the information before me whether its disclosure would assist the Applicant in relation to their stated purpose.

(d) 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.⁷ Accordingly, I must consider the likelihood and potential effect of further dissemination of a third party's personal affairs information, if released.

As stated above, the Applicant's interest in the information has spanned over several years with multiple assertions and requests for similar information from the Agency. The Agency submits it is likely the Applicant would pursue and contact the third parties identified in the photographs in relation to the allegations raised.

Having considered the Applicant's stated purpose for seeking access to the document and the Agency's submission, I am of the view it is reasonably likely the personal privacy of the third parties, who are featured in the photographs, would be impacted should their personal affairs information be disclosed under the FOI Act.

⁶ *Victoria Police v Marke* [2008] VSCA 218 at [104].

⁷ *Ibid* at [68].

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

Where an applicant's motivation for seeking access to a third party's personal affairs information is more closely related to a personal interest and in the absence of a broader public interest, access to the document is more likely to be unreasonable.⁸

I acknowledge the Applicant's personal interest in obtaining access to the document in full.

However, while I accept disclosure of the document may serve the Applicant's personal interest, I do not consider its disclosure would serve a broader public interest.

Rather, I am of the view the public interest lies in the Agency maintaining the personal privacy of the third parties given the broader circumstances described above.

(f) The likelihood disclosure would cause distress or anxiety to the individuals to whom it relates

Having considered the Applicant's reasons for seeking access to the document, the seriousness of the allegations made by the Applicant and the Agency's submission, I am satisfied disclosure would likely cause distress and anxiety to the third parties who are identified in the document.

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

I am also 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.⁹

However, there is insufficient information to satisfy me this is a relevant consideration in this matter.

24. Having considered the above factors, on balance, I am satisfied disclosure of the third parties' personal affairs information in the document would be unreasonable in the circumstances.
25. Accordingly, I am satisfied the document is exempt under section 33(1).

Section 25 – Deletion of exempt or irrelevant information

26. 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.
27. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'¹⁰ 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 25.¹¹
28. I have considered whether it is practicable to provide an edited copy of the document with exempt information deleted in accordance with section 25. I am not satisfied it is practicable to delete the exempt information in the document as the edited document would not retain meaning.

⁸ *Gunawan v Department of Education* [1999] VCAT 665.

⁹ Section 33(2A).

¹⁰ *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].

¹¹ *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].

Conclusion

29. On the information before me, I am satisfied the document is exempt under section 33(1).
30. As I am satisfied it is not practicable to release an edited copy of the document with exempt information deleted from the document, I have determined to refuse access to the document in full.

Review rights

31. If the Applicant is not satisfied with my decision, they are entitled to apply to the Victorian Civil and Administrative Tribunal (**VCAT**) for it to be reviewed.¹²
32. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹³
33. 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.
34. 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.¹⁴

¹² The Applicant in section 50(1)(b) and the Agency in section 50(3D).

¹³ Section 52(5).

¹⁴ Sections 50(3F) and (3FA).