

Notice of Decision and Reasons for Decision

Applicant:	'DU4'
Agency:	Department of Families, Fairness and Housing
Decision date:	19 October 2021
Exemption considered:	Section 33(1)
Citation:	'DU4' and Department of Families, Fairness and Housing (Freedom of Information) [2021] VICmr 311 (19 October 2021)

FREEDOM OF INFORMATION – wardship file – ward of state record – care leaver record – information regarding third parties – age of documents – passage of time

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 conducted a review under section 49F of the Agency's fresh 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.

I am satisfied certain information concerning persons other than the Applicant in the documents is exempt under section 33(1). However, I am satisfied the disclosure of a small amount of additional information in Documents 1 and 18 would not be unreasonable in the circumstances.

Where I am satisfied it is practicable to provide the Applicant with an edited copy of a document with exempt information, access is granted to the document in part. Where I am not satisfied it is practicable to release a document in part, access is refused in full.

The Schedule of Documents in **Annexure 1** sets out my decision in relation to each document.

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner
19 October 2021

Reasons for Decision

Background to review

1. The Applicant, through their representative, made a request to the Agency seeking access to the following documents:

...any records you have from [their] time as a Ward of the State under [their] birth name [Applicant's name].
2. The Agency identified 318 pages of documents falling within the terms of the Applicant's request and granted access to 272 pages in full and 38 pages in part. I note in its provision of documents to OVIC that in fact three documents were refused in full.
3. The Agency relies on section 33(1) to refuse access to certain information in the documents. The Agency's decision letter sets out the reasons for its decision.

Review application

4. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
5. Section 49M(1) permits an agency to make a fresh decision on an FOI request during a review.
6. On [date], the Agency made a fresh decision in which it determined to release further information in the documents. The effect of the fresh decision was to release the majority of information in the documents, with access refused to a small amount only.
7. The Applicant did not agree with the Agency's fresh decision and as required by section 49MA(2), I proceeded with my review on the basis of the fresh decision.
8. I have examined copies of the documents subject to review.
9. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
10. I have considered all communications and submissions received from the parties.
11. The requested documents came into existence more than five years prior to the commencement of the FOI Act.
12. Section 67 provides:

67 Retrospective operation of law

- (1) An applicant for access to records about himself, within the meaning of section 33, shall be entitled to receive access subject to this Act to any such record notwithstanding that the record came into existence at any time prior to the date of commencement of this section.

- (2) An applicant for access to a document other than those referred to in subsection (1) shall be entitled to receive access, subject to this Act, to any such document provided that it came into existence not more than five years prior to the date of commencement of this section

13. The documents contain the Applicant's 'personal affairs information' within the meaning of section 33(1). As such, I am of the view the documents are subject to access under the FOI Act.
14. 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.
15. 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) – Personal affairs information of third parties

16. 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; and
 - (b) such disclosure would be 'unreasonable'.
17. 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.
18. The concept of 'unreasonable disclosure' involves balancing the public interest in the disclosure of official information with the personal interest in privacy in the particular circumstances of a matter.
19. In determining whether the disclosure of a document would involve the unreasonable disclosure of information relating to the personal affairs of any person, I must take into account whether the disclosure of the information would, or would be reasonably likely to, endanger the life or physical safety of any person.¹ However, I do not consider this is a relevant factor in the circumstances.
20. Further, 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 (or their next of kin, if deceased) an FOI request has been received for documents containing their personal information and seek their view as to whether disclosure of the document should occur, subject to the following exceptions:
 - (a) the notification would be reasonably likely to endanger the life or physical safety of a person, or cause them undue distress, or is otherwise unreasonable in the circumstances;
 - (b) the notification would be reasonably likely to increase the risk to the safety of a person experiencing family violence; or

¹ Section 33(2A).

(c) it is not practicable to do so.

21. The Agency did not consult with third parties named in the documents. I agree it would not be practicable to consult with the relevant persons given their age, the sensitivity of the documents, and the likelihood that consultation would cause undue distress.

Do the documents contain personal affairs information of third parties?

22. The documents contain the names and personal details of persons other than the Applicant.
23. Accordingly, I am satisfied such information is 'personal affairs information' of third parties for the purposes of section 33(1).

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

24. In determining whether disclosure of the personal affairs information in the documents would be unreasonable, I have taken the following factors into consideration:
- (a) the nature of the personal affairs information and the circumstances in which it was obtained;
 - (b) the applicant's interest in the information and, if appropriate, whether their purpose for seeking access to the information is likely to be achieved;
 - (c) whether any public interest would be promoted by disclosure of the information;
 - (d) whether a third party to whom the information relates objects, or would be likely to object to disclosure of the information; and
 - (e) whether disclosure of the information could cause a third party undue stress and anxiety.
25. I acknowledge the Applicant likely knows the identity of some of the third parties whose information appears in the documents. Nevertheless, even where an applicant claims to know the identity of a third party, disclosure of their personal affairs information under the FOI Act may still be unreasonable in the circumstances.²
26. In its submission, the Agency advised it considered disclosure of the personal affairs information would be unreasonable for the following reasons:

The department acknowledges the strong interest of former State wards in being able to access as much information as possible about themselves, their family, identity and connection; circumstances surrounding placement in care; and details of their time in care. This acknowledgement is reflected in the department's decision to release 272 of the 318 pages relevant to the request in full.

In relation to the personal details of third parties such as family members of the Applicant's carers or employers, and of State wards who are not related to the Applicant; the department submits that the individuals are not closely connected to the Applicant and their personal affairs information does not add to an understanding of the documents. The department submits that in this circumstance, protecting the privacy of the individuals identified within the documents outweighs any public interest which might be satisfied through the release of the information.

27. In their request and submission, the Applicant advises they seek full access to their records [reasons for requesting records].

² *AB v Department of Education and Early Childhood Development* [2011] VCAT 1263 at [58]; *Akers v Victoria Police* [2003] VCAT 397.

28. I have carefully considered the Agency's fresh decision. With the exception of Documents 1 and 18, the Agency has only exempted information where it relates solely to persons other than the Applicant.
29. I agree this information constitutes the personal affairs information of third parties and its disclosure would be unreasonable for the following reasons:
- (a) the information relates to persons other than the Applicant, most of whom were children at that time and in the care of the State;
 - (b) the information was obtained in the course of providing sensitive services to children who were in the care of the State;
 - (c) the information remains sensitive despite the passage of time;
 - (d) given these sensitivities, it is likely the third parties would object to the release of their personal affairs information in the documents under the FOI Act in circumstances where I consider its disclosure could cause those persons undue stress and anxiety; and
 - (e) must consider that section 33(1) is designed to protect the personal privacy of individuals and, in this instance, I am satisfied the privacy of those third parties outweighs the Applicant's interest in obtaining access to the documents.
30. In relation to Documents 1 and 18, I have determined it would not be unreasonable to release certain personal affairs information for the following reasons:
- (a) the information relates to the Applicant;
 - (b) the document is now over [number of decades]; I consider with the passage of time the sensitivity of the information contained is significantly reduced;
 - (c) disclosure serves the Applicant's reasons for [their] request being to have access to as much information as possible about [their] childhood;
 - (d) I consider disclosure of the third party information would not affect those third parties given the nature of the information and the passage of time;
 - (e) the Applicant's interest in the documents outweighs the third parties' privacy in this instance.
31. My decision in relation to section 33(1) is set out in the Schedule of Documents at **Annexure 1**.

Section 25 – Deletion of exempt or irrelevant information

32. Section 25 requires an agency to grant access to an edited copy of a document where it is practicable to delete exempt or irrelevant information and the applicant agrees to receiving such a copy.
33. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'³ and the effectiveness of the deletions. Where

³ *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].

deletions would render a document meaningless, they are not 'practicable', and release of the document is not required under section 25.⁴

34. I have considered the effect of deleting exempt information from the documents. In my view, it is practicable for the Agency to delete the [irrelevant / exempt] information, because it would not require substantial time and effort, and the edited documents would retain meaning.

Conclusion

35. On the information before me, I am satisfied certain information in the documents is exempt under section 33(1). However, I am satisfied the disclosure of a small amount of additional information in Documents 1 and 18 would not be unreasonable in the circumstances.
36. While I acknowledge the importance for the Applicant of obtaining full access to official documents that contain details of their childhood while they were under the care of the State, the only information I have determined is exempt from release concerns persons other than the Applicant in circumstances where the third party's right to personal privacy outweighs the Applicant's right to obtain access to the third party's personal information.
37. Where I am satisfied it is practicable to provide the Applicant with an edited copy of a document with exempt information, access is granted to the document in part. Where I am not satisfied it is practicable to release a document in part, access is refused in full.
38. The Schedule of Documents in **Annexure 1** sets out my decision in relation to each document.

Review rights

39. If either party to this review is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.⁵
40. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.⁶
41. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.⁷
42. 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.
43. 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.⁸

⁴ *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].

⁵ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

⁶ Section 52(5).

⁷ Section 52(9).

⁸ Sections 50(3F) and (3FA).

Third party review rights

44. If I determine to disclose personal affairs information of a third party in a document, which an agency has exempted from release under section 33(1), if practicable, I must notify all relevant third parties of their right to apply to VCAT for a review of my decision.

45. In considering the meaning of 'practicable' in relation to other sections of the FOI Act, VCAT has stated:

The use of the word 'practicable' in the legislation to my mind connotes a legislative intention to apply common sense principles. 'Practicable' is not a term of art or a term of precise meaning.

.... The use of the word indicates there should be imported into the process the exercise of judgment by the agency concerned. It does not allow for the conclusion that because a task is possible, it must, ergo, be undertaken.⁹

46. VCAT also considers the possibility of an unnecessary intrusion into the lives of a third party is relevant when assessing the practicability of notifying them of a decision concerning their personal affairs information.¹⁰

47. In this case, I am satisfied notifying the relevant third parties would not be practicable as it would be an unnecessary intrusion for the following reasons:

- (a) the nature of the information to be released;
- (b) the context in which the information was provided to the Agency; and
- (c) the passage of time since the documents were created.

48. On balance, given the unnecessary intrusion into the lives of the individuals whose personal affairs information appears in the documents, I am satisfied it is not practicable to notify the relevant third parties of their right of review.

When this decision takes effect

49. My decision does not take effect until the Agency's 14 day review period expires.

50. If a review application is made to VCAT, my decision will be subject to any VCAT determination.

⁹ *Re Schubert and Department of Premier and Cabinet* (2001) 19 VAR 35 at [45].

¹⁰ *Coulston v Office of Public Prosecutions Victoria* [2010] VCAT 1234 at [42].

Annexure 1 – Schedule of Documents

Doc. No	Date of document	Title or description of document	No. of page (page no. in complete Ward file)	Agency decision	OVIC decision	OVIC comments
1	[date]	Inspector's Report	2 (72-73)	Released in part Section 33(1)	Release in full	Section 33(1): The document contains the personal affairs information of a third party. I am satisfied disclosure of this information would not be unreasonable in the circumstances for the reasons described in the Notice of Decision above.
2	[date]	Letter to [named person] from the Welfare Dept.	1 (82)	Released in part Section 33(1)	Release in full	In its submission, the Agency no longer relies on section 33(1) to exempt this document from release. Section 33(1): See comments for Document 1.
3	[date]	Letter from [named person] to the Welfare Dept.	5 (83-87)	Release in full	Not subject to review	
4	[date]	Communications between Welfare	1 (90)	Release in full	Not subject to review	

Doc. No	Date of document	Title or description of document	No. of page (page no. in complete Ward file)	Agency decision	OVIC decision	OVIC comments
		Dept. offices				
5	[date]	File note	1 (91)	Release in full	Not subject to review	
6	[date]	Letter from [named person] to the Welfare Dept.	2 (102-103)	Release in full	Not subject to review	
7	[date]	File note	1 (106)	Release in full	Not subject to review	
8	[date]	File note	1 (107)	Release in full	Not subject to review	
9	[date]	File note	1 (113)	Released in part Section 33(1)	Release in part Sections 33(1), 25 The document is to be released except for the following information, which is exempt under section 33(1), and is to be deleted in accordance with section 25: <ul style="list-style-type: none"> the information exempted by the Agency under 	Section 33(1): The document contains the personal affairs information of third parties. I am satisfied disclosure of this information would be unreasonable in the circumstances for the reasons described in the Notice of Decision above. Section 25: However, I am satisfied it is practicable to provide the Applicant with an

Doc. No	Date of document	Title or description of document	No. of page (page no. in complete Ward file)	Agency decision	OVIC decision	OVIC comments
					section 33(1).	edited copy of this document with exempt information deleted in accordance with section 25.
10	[date]	Victoria Police General Report	1 (116)	Release in full	Not subject to review	
11	[date]	File note	1 (117)	Release in full	Not subject to review	
12	[date]	Inspector's Report	1 (155)	Released in part Section 33(1)	Release in part Sections 33(1), 25 The document is to be released with the information exempted by the Agency under section 33(1) deleted in accordance with section 25.	Section 33(1): See comments for Document 9. Section 25: See comments for Document 9.
13	[date]	Inspector's Report	1 (163)	Released in part Section 33(1)	Release in part Sections 33(1), 25 The document is to be released with the information exempted	Section 33(1): See comments for Document 9. Section 25: See comments for Document 9.

Doc. No	Date of document	Title or description of document	No. of page (page no. in complete Ward file)	Agency decision	OVIC decision	OVIC comments
					by the Agency under section 33(1) deleted in accordance with section 25.	
14	[date]	Inspector's Report	1 (164)	Released in part Section 33(1)	Release in part Sections 33(1), 25 The document is to be released with the information exempted by the Agency under section 33(1) deleted in accordance with section 25.	Section 33(1): See comments for Document 9. Section 25: See comments for Document 9.
15	[date]	Inspector's Report	1 (194)	Released in part Section 33(1)	Release in part Sections 33(1), 25 The document is to be released with the information exempted by the Agency under section 33(1) deleted in accordance with section 25.	Section 33(1): See comments for Document 9. Section 25: See comments for Document 9.
16	[date]	Inspector's Report	3 (225-227)	Released in part Section 33(1)	Release in part Sections 33(1), 25	Section 33(1): See comments for Document 9.

Doc. No	Date of document	Title or description of document	No. of page (page no. in complete Ward file)	Agency decision	OVIC decision	OVIC comments
					The document is to be released with the information exempted by the Agency under section 33(1) deleted in accordance with section 25.	Section 25: See comments for Document 9.
17	[date]	Memorandum	1 (228)	Released in part Section 33(1)	Release in part Sections 33(1), 25 The document is to be released with the information exempted by the Agency under section 33(1) deleted in accordance with section 25.	Section 33(1): See comments for Document 9. Section 25: See comments for Document 9.
18	[date]	Inspector's Report (regarding a third party)	1 (229)	Released in part Section 33(1)	Release in part Sections 33(1), 25 The document is to be released with the following information exempt under section 33(1) deleted in accordance with section 25: <ul style="list-style-type: none"> the information indicated 	Section 33(1): This document concerns an incident that did not directly involve the Applicant, but their [relationship descriptor]. I am satisfied disclosure of this information would not be unreasonable in the circumstances for the reasons described in the Notice of Decision above.

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					in the marked up document provided by OVIC to the Agency with this decision.	However, the document also contains information as described in Document 9. I am satisfied disclosure of this information would be unreasonable for the reasons set out in Document 9. Section 25: See comments for Document 9.
19	v	Letter to health practitioner approving quote	1 (232)	Released in part Section 33(1)	Release in part Sections 33(1), 25 The document is to be released with the information exempted by the Agency under section 33(1) deleted in accordance with section 25.	Section 33(1): See comments for Document 9. Section 25: See comments for Document 9.
20	[date]	Letter to the dept. from [named person]	3 (248-250)	Released in part Section 33(1)	Release in part Sections 33(1), 25 The document is to be released with the information exempted by the Agency under	Section 33(1): See comments for Document 9. Section 25: See comments for Document 9.

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					section 33(1) deleted in accordance with section 25.	
21	[date]	Letter to health practitioner approving quote	1 (257)	Released in part Section 33(1)	Release in part Sections 33(1), 25 The document is to be released with the information exempted by the Agency under section 33(1) deleted in accordance with section 25.	Section 33(1): See comments for Document 9. Section 25: See comments for Document 9.
22	[date]	Handwritten note	1 (264)	Released in part Section 33(1)	Release in part Sections 33(1), 25 The document is to be released with the information exempted by the Agency under section 33(1) deleted in accordance with section 25.	Section 33(1): See comments for Document 9. Section 25: See comments for Document 9.
23	[date]	Note to [named person]	1 (265)	Released in part Section 33(1)	Release in part Sections 33(1), 25	Section 33(1): See comments for Document 9. Section 25: See comments for

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					The document is to be released with the information exempted by the Agency under section 33(1) deleted in accordance with section 25.	Document 9.
24	[date]	Letter from [named person] to the dept.	1 (268)	Released in part Section 33(1)	Release in part Sections 33(1), 25 The document is to be released with the information exempted by the Agency under section 33(1) deleted in accordance with section 25.	Section 33(1): See comments for Document 9. Section 25: See comments for Document 9.
25	[date]	Letter from [named person] to the dept.	1 (269)	Released in part Section 33(1)	Refuse in full Section 33(1)	Section 33(1): See comments for Document 9. This document does not relate to the Applicant, but relates to their former carer. Section 25: See comments for Document 9.
26	[date]	File note	1 (270)	Released in part Section 33(1)	Release in part Sections 33(1), 25	Section 33(1): See comments for Document 9.

Doc. No	Date of document	Title or description of document	No. of page (page no. in complete Ward file)	Agency decision	OVIC decision	OVIC comments
					The document is to be released with the information exempted by the Agency under section 33(1) deleted in accordance with section 25.	Section 25: See comments for Document 9.
27	[date]	Inspector's Report	1 (271)	Released in part Section 33(1)	Release in part Sections 33(1), 25 The document is to be released with the information exempted by the Agency under section 33(1) deleted in accordance with section 25.	Section 33(1): See comments for Document 9. Section 25: See comments for Document 9.
28	[date]	Note to [named person]	1 (274)	Released in part Section 33(1)	Release in part Sections 33(1), 25 The document is to be released with the information exempted by the Agency under section 33(1) deleted in accordance with section 25.	Section 33(1): See comments for Document 9. Section 25: See comments for Document 9.

Doc. No	Date of document	Title or description of document	No. of page (page no. in complete Ward file)	Agency decision	OVIC decision	OVIC comments
29	[date]	Memorandum	1 (227)	Released in part Section 33(1)	Release in part Sections 33(1), 25 The document is to be released with the information exempted by the Agency under section 33(1) deleted in accordance with section 25.	Section 33(1): See comments for Document 9. Section 25: See comments for Document 9.
30	[date]	Note to [named person]	1 (279)	Released in part Section 33(1)	Release in part Sections 33(1), 25 The document is to be released with the information exempted by the Agency under section 33(1) deleted in accordance with section 25.	Section 33(1): See comments for Document 9. Section 25: See comments for Document 9.
31	[date]	Note to [named person]	1 (280)	Released in part Section 33(1)	Release in part Sections 33(1), 25 The document is to be released with the information exempted by the Agency under	Section 33(1): See comments for Document 9. Section 25: See comments for Document 9.

Doc. No	Date of document	Title or description of document	No. of page (page no. in complete Ward file)	Agency decision	OVIC decision	OVIC comments
					section 33(1) deleted in accordance with section 25.	
32	[date]	Note to [named person]	1 (281)	Released in part Section 33(1)	Release in part Sections 33(1), 25 The document is to be released with the information exempted by the Agency under section 33(1) deleted in accordance with section 25.	Section 33(1): See comments for Document 9. Section 25: See comments for Document 9.
33	n/a	List of names	1 (291)	Refused in full Section 33(1)	Refuse in full Section 33(1)	Section 33(1): See comments for Document 9. I confirm this document does not contain any information about the Applicant. Section 25: See comments for Document 9.
34	[date]	File note	1 (293)	Released in part Section 33(1)	Release in part Sections 33(1), 25 The document is to be released with the information exempted	Section 33(1): See comments for Document 9. Section 25: See comments for Document 9.

Doc. No	Date of document	Title or description of document	No. of page (page no. in complete Ward file)	Agency decision	OVIC decision	OVIC comments
					by the Agency under section 33(1) deleted in accordance with section 25.	
35	[date]	File note	1 (300)	Released in part Section 33(1)	Release in part Sections 33(1), 25 The document is to be released with the information exempted by the Agency under section 33(1) deleted in accordance with section 25.	Section 33(1): See comments for Document 9. Section 25: See comments for Document 9.
36	[date]	File note	1 (308)	Released in part Section 33(1)	Release in part Sections 33(1), 25 The document is to be released with the information exempted by the Agency under section 33(1) deleted in accordance with section 25.	Section 33(1): See comments for Document 9. Section 25: See comments for Document 9.
37	[date]	Statement by [named person]	2 (309-310)	Released in part Section 33(1)	Release in part Sections 33(1), 25	Section 33(1): See comments for Document 9.

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					The document is to be released with the information exempted by the Agency under section 33(1) deleted in accordance with section 25.	Section 25: See comments for Document 9.
38	n/a	Back of file cover	1 (315)	Released in part Section 33(1)	Release in part Sections 33(1), 25 The document is to be released with the information exempted by the Agency under section 33(1) deleted in accordance with section 25.	Section 33(1): From the information before me, the name in this document is administrative in nature as it relates to record keeping. In these circumstances, I consider it would be unreasonable to release the personal information of the third party.