

## Notice of Decision and Reasons for Decision

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Applicant:	'DA2'
Agency:	Department of Health
Decision date:	13 May 2021
Provision and exemption considered:	Sections 25A(5), 33(1)
Citation:	'DA2' and Department of Health ( <i>Freedom of Information</i> ) [2021] VICmr 129 (13 May 2021)

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FREEDOM OF INFORMATION – refusal to process request on grounds all documents, should any exist, would be exempt – disclosure of personal affairs information – not satisfied all documents would be exempt

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 decision to refuse access to a document requested by the Applicant under the FOI Act.

My decision on the Applicant's request differs from the Agency's decision. I am not satisfied it is apparent from the nature of the document, as described in the request, that it would be exempt under section 33(1).

The effect of my decision is the Agency is required to search for and identify the document or documents relevant to the terms of the Applicant's request and assess any such documents in accordance with the FOI Act.

My reasons for decision follow.

Sven Bluemmel  
Information Commissioner

13 May 2021

## Reasons for Decision

### Background to review

1. The Applicant made a request to the Agency formerly operating as the Department of Health and Human Services (DHHS) for access to the following documents:

A copy of an email sent from DHHS to a person using the name [third party name] which contains the subject line '[redacted direct quote]'. The time frame for this request is [date range].
2. The Agency sought clarification from the Applicant regarding the terms of their request. In response, the Applicant providing the following information to assist with their request:

I can confirm that I am not the recipient of the email in question and do not have authority to act on the recipient's behalf. The email in question was sent from an area of DHHS described as [redacted direct quote]. The email address of the sender is [email address]. [Background contextual information].
3. The Agency refused to grant access to documents in accordance with the Applicant's request under section 25A(5). In doing so, the Agency was not required to identify any documents relevant to the request on grounds all documents to which the request relates, should any exist, would be exempt under section 33(1).

### Review

4. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
5. I note the Applicant provided information to OVIC and the Agency, where they advised that a version of the requested document was available online on [platform name].
6. During the review, the Applicant also advised they were willing to receive a copy of the requested document with any personal affairs information deleted from the document.
7. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
8. I have considered all communications and submissions received from the parties.
9. 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.
10. 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 application of section 25A(5) to refuse to grant access to documents

11. Section 25A(5) provides an agency may refuse to grant access to a request for documents, without having identified any or all of the documents, if it is apparent from the nature of the request that all documents would be exempt in full under the FOI Act, and either there is no obligation for the agency to provide the applicant with an edited copy of the documents or the applicant does not agree to receive an edited copy of the documents.

12. The power to refuse a request under section 25A(5) is carefully circumscribed. The Supreme Court of Victoria has held the power to refuse an FOI request under this provision will apply in limited circumstances where each of the following three elements are met:
- a) Based on the description of the document, as requested in the FOI request, the decision maker must work out the inherent or essential quality or character of the requested document.
  - b) The decision maker must determine whether the document, as described by the Applicant, would be exempt.
  - c) From the face of the FOI request or the Applicant's agreement, there must be no scope for the agency to provide an edited copy of any of the document.<sup>1</sup>

***What is the essential character of the document requested?***

13. I am satisfied the nature or character of the requested document, as described in the Applicant's FOI request, is apparent from the terms of their request, being an email sent from the Agency to a third party in relation to [description of COVID-19-related] directions.

***Would the requested document, as described in the FOI request, be exempt?***

14. As stated above, in refusing access to the requested document under section 25A(5), the Agency submits the document, should it exist, would be exempt in full under section 33(1).

***Application of section 33(1)***

15. 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;<sup>2</sup> and
  - b) such disclosure would be 'unreasonable'.

**Would the requested document contain personal affairs information?**

16. Personal affairs information includes any information that identifies any person or discloses their address or location. It also includes any information from which this may be reasonably determined.<sup>3</sup>
17. I also note, the Victorian Civil and Administrative Tribunal (**VCAT**) has interpreted the scope of 'personal affairs information' broadly to include matters relating to health, private behaviour, home life or personal or family relationships of individuals.<sup>4</sup>
18. Based on the terms of the Applicant's request, I am satisfied there would be personal affairs information of third parties in the requested document.
19. However, on the face of the request, I am not satisfied the entire content of the document would constitute personal affairs information of a third party or parties. For example, based on the terms of the request, the requested document may contain general information relating to the [COVID-19-related] directions, which do not relate to any individuals' personal affairs.

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<sup>1</sup> *Knight v Corrections Victoria* [2010] VSC 338.

<sup>2</sup> Sections 33(1) and (2).

<sup>3</sup> Section 33(9).

<sup>4</sup> *Re F and Health Department* (1988) 2 VAR 458 as quoted in *RFJ v Victoria Police FOI Division* [2013] VCAT 1267 at [103].

Would release of the personal affairs information of third parties be unreasonable in the circumstances?

20. Determining whether disclosure of a document would be unreasonable in the circumstances involves balancing the public interest in the disclosure of official information held by a government agency with the interest in protecting an individual's personal privacy in the circumstances.<sup>5</sup>
21. The concept of 'unreasonable disclosure' involves determining whether the public interest in disclosure of official information is outweighed by the interest in protecting a third party's right to personal privacy in the circumstances.
22. The Victorian Court of Appeal has 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'.<sup>6</sup> 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'.<sup>7</sup>
23. I also note *Coulson v Department of Premier and Cabinet*,<sup>8</sup> in which VCAT held that 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.
24. I am satisfied it would be unreasonable to release certain personal affairs information of third parties that would likely be contained in the document, including names, email addresses and information related to an individual's health or private behaviour.
25. However, I am not satisfied it would necessarily be unreasonable to release other parts of the requested document, which may contain general information for members of the public regarding the application of [COVID-19-related] directions. My view on this issue is based solely on the terms of the request.
26. In relation to the personal affairs of any Agency officer/s, subject to the Agency demonstrating special circumstances apply, I do not consider it would be unreasonable to disclose the name of an Agency officer where a document merely records or represents the officer, regardless of their seniority, carrying out their usual duties or responsibilities as a public servant. The nature of such information is to be contrasted with personal affairs information concerning an agency officer in their personal life or in a private capacity.
27. For the above reasons, I am not satisfied all personal affairs information in the requested document, should it exist, would be exempt under section 33(1).

***Deletion of exempt or irrelevant information***

28. 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.
29. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'<sup>9</sup> and the effectiveness of the deletions. Where deletions

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<sup>5</sup> *Re Page v Metropolitan Transit Authority* (1988) 2 VAR 243 at 245-6.

<sup>6</sup> *Victoria Police v Marke* [2008] VSCA 218 at [76].

<sup>7</sup> *Victoria Police v Marke* [2008] VSCA 218 at [79].

<sup>8</sup> *(Review and Regulation)* [2018] VCAT 229.

<sup>9</sup> *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].

would render a document meaningless, they are not 'practicable', and release of the document is not required under section 25.<sup>10</sup>

30. Having considered the particular circumstances of this matter, I am satisfied there would likely be scope to provide the Applicant with an edited copy the requested document, should any exist, with any exempt information deleted in accordance with section 25. I am also satisfied it would be practicable to do so as it would likely not require substantial time and effort, and the edited documents would likely retain sufficient meaning.
31. Accordingly, I am not satisfied the requirement under section 25A(5) for there to be no scope to provide the Applicant with edited copies of any of the documents is met in this case.

### **Conclusion**

32. As stated above, the power for an agency to refuse a request under section 25A(5) is carefully circumscribed and will apply to a limited category of cases only.
33. Having carefully considered the application of section 25A(5) to the requested document and for the reasons set out above, I am not satisfied it is apparent from the terms of the Applicant's request that a document relevant to the request would be exempt in full under section 33(1).
34. I am satisfied it would be practicable for the Agency to provide an edited copy of the requested document, if it exists, to the Applicant with exempt information deleted in accordance with section 25.
35. Accordingly, I am not satisfied each of the requirements of section 25A(5) are met such that the Applicant's request for access to the requested document can be categorically refused.
36. The effect of my decision is the Agency is required to search for, identify and assess any document or documents relevant to the terms of the Applicant's request in accordance the FOI Act.

### **Review rights**

37. If the Agency is not satisfied with my decision, they are entitled to apply to the Victorian Civil and Administrative Tribunal (**VCAT**) for it to be reviewed.<sup>11</sup>
38. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.<sup>12</sup>
39. Information about how to apply to VCAT is available online at [www.vcat.vic.gov.au](http://www.vcat.vic.gov.au). Alternatively, VCAT may be contacted by email at [admin@vcat.vic.gov.au](mailto:admin@vcat.vic.gov.au) or by telephone on 1300 018 228.
40. 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.<sup>13</sup>

### **When this decision takes effect**

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<sup>10</sup> *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].

<sup>11</sup> The Applicant in section 50(1)(b) and the Agency in section 50(3D).

<sup>12</sup> Section 52(9).

<sup>13</sup> Sections 50(3F) and (3FA).

41. My decision does not take effect until the Agency's 14 day review period expires, after which I consider the Agency has 28 days to process the Applicant's request in accordance with the FOI Act.