

Notice of Decision and Reasons for Decision

Applicant:	'DW6'
Agency:	Department of Education and Training
Decision date:	1 December 2021
Exemptions considered:	Sections 33(1), 35(1)(b), 38 and section 166(2) of the <i>Family Violence Protection Act 2008</i> (Vic)
Citation:	'DW6' and Department of Education and Training (<i>Freedom of Information</i>) [2021] VICmr 329 (1 December 2021)

FREEDOM OF INFORMATION – parent seeking information about child’s education – parent complaints – Family Law matters – parent disputes handling of serious allegations – student welfare matters – *Family Violence Protection Act 2008* (Vic) – section 61B(3)

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 is the same as the Agency’s decision.

I am satisfied information in the documents is exempt under sections 33(1), 35(1)(b) and 38 in conjunction with section 166(2) of the *Family Violence Protection Act 2008* (Vic) (**FVP Act**).

Where I am satisfied it is practicable to provide the Applicant with an edited copy of a document with exempt information deleted in accordance with section 25, access to the document is granted in part. Where I have determined it is not practicable to do, access to a document 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

1 December 2021

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency seeking access to certain documents.
2. Following consultation with the Agency, the Applicant clarified the terms of their request to the following documents:

...

Under the Freedom of Information Act, please send me a copy of the emails that the Principal has received about me from my [former partner], including any emails that [they] sent/ received to/ from other members of the School Council about me.

Can you also please include any emails that have been sent about me between [the school principal] and [their] staff (this is additional and inclusive of the emails from my [former partner] and between School Council members)? These also pertain to the defamation matter.

Date range emails sent: [date range] – [date range]
3. The Agency identified five documents falling within the terms of the Applicant's request and refused access to one document in part and four documents in full.
4. The Agency relies on sections 33(1), 35(1)(b), 38 and section 166(2) of the FVP Act to refuse access to information in the documents. The Agency's decision letter sets out the reasons for its decision.

Review application

5. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
6. I have examined a copy of the documents subject to review.
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.

Applicant's concerns regarding the adequacy of the Agency's document searches

11. During the review, the Applicant raised concerns about the adequacy of the Agency's document searches as they believe additional documents should have been identified in response to their request.
12. In accordance with section 61B(3), these concerns were addressed as part of the 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, however, the Applicant was not satisfied with the outcome of those enquiries.

14. Having considered the terms of the Applicant's request and information provided by the Agency, I am satisfied the Applicant's concerns have been fully pursued and there are no grounds for making further inquiries with the Agency in relation to the concerns raised or the taking of further action.

Review of exemptions

Section 33(1) – Documents affecting the personal privacy of third parties

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;¹ and
 - (b) such disclosure would be 'unreasonable'.

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

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. 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.⁴
19. A third party's opinion or observations about another person's conduct can constitute information related to the third party's personal affairs.⁵
20. I am satisfied the documents contain information capable of identifying persons other than Applicant (**third parties**), including Agency officers, students and other third parties. The relevant information includes names, email addresses, telephone numbers and information concerning the personal circumstances of third parties.
21. Certain information to which the Agency refused access contains personal affairs information relating to the Applicant and their child. However, I consider this information is intertwined with the personal affairs information of third parties.

Would disclosure of the personal affairs information be unreasonable?

22. 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.
23. In this matter, I acknowledge the Applicant is reasonably likely to be aware of the identity of certain third parties whose information appears in the documents. However, even in circumstances where

¹ Sections 33(1) and (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].

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

⁵ *Richardson v Business Licensing Authority* [2003] VCAT 1053, cited in *Davis v Victoria Police* [2008] VCAT 1343 at [43]; *Pritchard v Victoria Police* [2008] VCAT 913 at [24]; *Mrs R v Ballarat Health Services* [2007] VCAT 2397 at [13].

a person named in a document is known to an applicant, it may still be unreasonable to release such information under the FOI Act.⁶

24. The Victorian Supreme Court of Appeal in *Victoria Police v Marke*,⁷ 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'. 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'.⁸
25. Whether or not an agency officer's personal affairs information is exempt under section 33(1) must be considered in the context of the circumstances of each matter.⁹
26. In determining whether disclosure of personal affairs information would be unreasonable in these circumstances, I have considered the following factors:

(a) The nature of the information in the document

I acknowledge the documents contain information concerning the personal affairs of the Applicant and their child. However, the documents also contain the personal affairs information of third parties.

In my view, the personal affairs information in the documents is sensitive in nature and contains allegations relating to the Applicant, and also relates to their child and other third parties.

In relation to the personal affairs information of agency officers, VCAT has generally accepted there is nothing particularly sensitive about matters concerning or arising out of the course of one's official duties.¹⁰

Whilst I note VCAT has found it would be unreasonable to disclose the personal affairs information of non-executive staff, in my view, the seniority of an agency officer is not a determinative factor as to whether disclosure of their personal affairs information would be unreasonable. Rather, whether the personal affairs information of Agency officers is exempt under section 33(1) must be considered in the circumstances of each matter.¹¹

The documents record Agency officers carrying out their usual employment responsibilities. 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. I consider this approach accords with the object and purpose of the FOI Act and the Victorian Parliament's intention that the maximum amount of government held information be disclosed under the FOI Act limited only by an exemption, including where it is necessary protect the private affairs of a person in respect of whom the information is collected and held by the agency.

(b) The circumstances in which the personal affairs information was obtained

The Agency school obtained information in the documents in connection with its functions associated with the provision of education services to children, noting the duty of care that

⁶ *AB v Department of Education and Early Childhood Development* [2011] VCAT 1263 at [58]; *Akers v Victoria Police* [2003] VCAT 397.

⁷ [2008] VSCA 218 at [76].

⁸ *Ibid* at [79].

⁹ *Coulson v Department of Premier and Cabinet (Review and Regulation)* [2018] VCAT 229.

¹⁰ *Re Milthorpe v Mt Alexander Shire Council* (1997) 12 VAR 105.

¹¹ *Coulson v Department of Premier and Cabinet (Review and Regulation)* [2008] VCAT 229.

exists between a school and a student in terms of a student's well-being and safety while in the care and under the supervision of the school.

Having considered the circumstances in which the personal affairs information was obtained and is held by the Agency, I am satisfied it is sensitive in nature and was provided to with an expectation of confidentiality.

(c) 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

While I acknowledge the Applicant's interest in obtaining access to all requested documents in full, I consider the Applicant's interest in the information would most likely serve their personal interest only.

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

Having reviewed the documents and noting the information that was released to the Applicant by the Agency, I do not consider there is a broader public interest to be promoted by disclosure of the personal affairs information of third parties in this matter.

(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 does 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

The Agency considered consultation with a number of the third parties, whose information appears in the documents, was not practicable. I accept consultation is not practicable in the circumstances of this matter.

Having reviewed the documents, I am satisfied the relevant third parties would be reasonably likely to object to the disclosure of their personal affairs information under the FOI Act given the context and nature of the 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.

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

¹³ Section 33(2B).

¹⁴ Section 33(2C).

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

Based on information provided by the Applicant and the Agency, I consider the Applicant is reasonably likely to disclose the personal affairs information in the documents, which would impact upon the personal privacy of the third parties.

- (f) Whether release of the information could lead the persons to whom it relates suffering stress and anxiety

I have carefully considered this factor, which on the information before me, is a relevant consideration in the circumstances.

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

In determining whether disclosure of a third party's personal affairs information would be unreasonable in the circumstances, I am required to take into account whether or not disclosure would be reasonably likely to endanger the life or physical safety of any person.¹⁶

In considering this factor, I note VCAT has held physical safety is not concerned solely with actual safety, but also with the perception of the relevant person as to whether they are safe.¹⁷ Similarly,¹⁸ VCAT has held the creator or subject of a document may have a perception of fear regarding their safety if their personal affairs information were to be disclosed.

In the circumstances, I consider the relevant third parties would be likely to perceive their safety may be at risk should their personal affairs information in the documents be disclosed.

27. I acknowledge the strong personal interest the Applicant has in obtaining access to the documents without redactions. However, having weighed up the above factors, on balance, I am satisfied disclosure of the personal affairs information of third parties in the documents would be unreasonable in the circumstances of this matter given the context and nature of the information in the documents.
28. As such, I am satisfied the relevant personal affairs information is exempt under section 33(1).
29. The Schedule of Documents in **Annexure 1** sets out my decision in relation to section 33(1).

Section 35(1)(b) – Disclosure of information communicated in confidence would impair an agency's ability to obtain information in future

30. 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
 - (b) 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.

Was information in the documents obtained by the Agency in confidence?

31. Whether information communicated by an individual to an agency was communicated in confidence is a question of fact.¹⁹

¹⁶ Section 33(2A).

¹⁷ *O'Sullivan v Police* (2005) 22 VAR 426; [2005] VCAT 532 at [19].

¹⁸ [2007] VCAT 2344 at [15].

¹⁹ *Ryder v Booth* [1985] VR 869 at [883]; *XYZ v Victoria Police* [2010] VCAT 255 at [264].

32. When determining whether information was communicated in confidence, it is necessary to consider the position from the perspective of a communicator, noting confidentiality can be express or implied from the circumstances of a matter.²⁰
33. Having reviewed the relevant information and given the context and nature of the information, I am satisfied it was communicated in confidence to the Agency.

Would disclosure of the information be contrary to the public interest?

34. In determining whether disclosure of information communication in confidence would be contrary to the public interest involves considering whether others in the position of a communicator would be reasonably likely to be inhibited or deterred from providing similar information to the Agency in the future.
35. As such, I am not permitted to have regard to other matters, such as any public interest in favour of release, or the extent to which an applicant's personal interest in the documents would be served by granting access to the documents. Rather, the provision is confined to determining the effect disclosure would have on the provision of similar communication to the Agency in the future.
36. Having carefully considered the circumstances of this matter and the nature of the relevant information, I am satisfied its disclosure under the FOI Act would be reasonably likely to impair the ability of the Agency to obtain similar information in the future on grounds that a communicator of sensitive information of this nature to the Agency would reasonably expect the information communicated to be held in confidence.
37. Accordingly, I am satisfied information provided in confidence to the Agency is exempt under section 35(1)(b).
38. The Schedule of Documents in **Annexure 1** sets out my decision in relation to section 35(1)(b).

Section 38 – Documents to which secrecy provision of enactments apply

39. A document is exempt under section 38 if:
 - (a) there is an enactment in force;
 - (b) that applies specifically to the kind of information in the document; and
 - (c) the enactment must prohibit persons, referred to in the enactment, from disclosing that specific kind of information (either absolutely or subject to exceptions or qualifications).
40. The Agency relies on section 38 in conjunction with section 166(2) of the FVP Act to refuse access to the documents.

Section 166(2) of the FVP Act

41. I am satisfied the FVP Act is an enactment in force for the purposes of section 38.
42. For section 38 to apply, the enactment must be formulated with such precision that it specifies the actual information sought to be withheld.

²⁰ XYZ v Victoria Police [2010] VCAT 255 at [265].

43. Section 166(2) of the FVP Act provides:

- (2) A person must not publish, or cause to be published, a report of the proceeding or about the order that contains—
- (a) if a party to or a witness in the proceeding, or a person the subject of the order, is a child—
- (i) the locality or any particulars likely to lead to the identification of the particular venue of the court; or
- (ii) any particulars likely to lead to the identification of the child or any other person involved in the proceeding, either as a party to the proceeding or as a witness in the proceeding, or the subject of the order—
- unless the court orders under section 169 that the locality or particulars may be published; or
- (b) if paragraph (a) does not apply—any particulars likely to lead to the identification of any person involved in the proceeding or the subject of the order, unless the court orders under section 169 that the particulars may be published; or
- (c) a picture of or including a person concerned in a proceeding for a family violence intervention order or a variation, extension or revocation of a recognised DVO, unless the court orders under section 169 that the picture may be published.

Penalty: In the case of a natural person, 100 penalty units or 2 years imprisonment or both; In the case of a body corporate— 500 penalty units.

44. In summary, section 166(2) prohibits the publication of a report of a proceeding or orders made under the FVP Act, other than in the Children’s Court, and that contain any particulars likely to lead to the identification of a person involved in such a proceeding. ‘Report’ is not defined in the FVP Act.
45. The unauthorised reporting of a proceeding or an order made under the FVP Act is an offence subject to a penalty, as set out above.
46. Having reviewed Document 2, I am satisfied section 166(2) of the FVP Act applies specifically to the kind of information in the document.
47. Finally, I am also satisfied section 166(2) prohibits persons from disclosing the specific kind of information in Document 2 and the prohibition is not subject to any exceptions or qualifications.
48. Accordingly, I am satisfied each of the requirements for section 38 of the FOI Act are met in respect of section 166(2) of the FVP Act and Document 2 is exempt under section 38.
49. The Schedule of Documents in **Annexure 1** sets out my decision in relation to section 38.

Section 25 – Deletion of exempt or irrelevant information

50. 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.
51. Determining what is ‘practicable’ requires consideration of the effort and editing involved in making the deletions ‘from a resources point of view’²¹ 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 25.²²

²¹ *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].

²² *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].

52. I have considered whether it is practicable to provide the Applicant with an edited copy of the documents with exempt information deleted in accordance with section 25. With the exception of Document 2, which I am satisfied is practicable to provide in edited form, I am not satisfied it is practicable to delete exempt information in the documents as to do so would render them devoid of meaning given the substantial amount of exempt information in the documents.
53. The Schedule of Documents in **Annexure 1** sets out my decision in relation to section 25.

Conclusion

54. On the information before me, I am satisfied information in the documents is exempt under sections 33(1), 35(1)(b) and 38 in conjunction with section 166(2) of the FVP Act.
55. Where I am satisfied it is practicable to provide the Applicant with an edited copy of a document with exempt information deleted in accordance with section 25, access to the document is granted in part. Where I have determined it is not practicable to do, access to a document is refused in full.
56. The Schedule of Documents in **Annexure 1** sets out my decision in relation to each document.

Review rights

57. If the Applicant is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.²³
58. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.²⁴
59. 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.
60. 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.²⁵

²³ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

²⁴ Section 52(5).

²⁵ Sections 50(3F) and (3FA).

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	No. of Pages	Agency Decision	OVIC Decision	OVIC Comments
1.	[date]	Email with attachment dated [date; time]	2	Refused in full Section 33(1)	Refuse in full Section 33(1)	<p>Section 33(1): I am satisfied disclosure of the personal affairs information of third parties would be unreasonable in the circumstances for the reasons set out in the Notice of Decision above. Accordingly, I am satisfied this document is exempt under section 33(1).</p> <p>Section 25: I am satisfied it is not practicable to provide the Applicant with an edited copy of this document with exempt information deleted, as to do so would render the remaining information devoid of meaning. Accordingly, access to the document is refused in full.</p>
2.	[date]	Email with attachment dated [date; time]	3	Released in part Sections 33(1), 38	Release in part Sections 33(1), 38, 25 The document is to be released with the information exempted from release by the Agency under sections 33(1) and 38 deleted in accordance with section 25.	<p>Sections 33(1): See comments for Document 1.</p> <p>Section 38: For the reasons set out in the Notice of Decision above, I am satisfied this document is exempt in part under section 38 of the FOI Act in conjunction with section 166(2) of the FVP Act.</p>

Document No.	Date of Document	Document Description	No. of Pages	Agency Decision	OVIC Decision	OVIC Comments
						Section 25: I am satisfied it is practicable to provide the Applicant with an edited copy of this document with exempt information deleted in accordance with section 25.
3.	[date]	Email chain (last email sent [date; time])	2	Refused in full Sections 33(1), 35(1)(b)	Refused in full Sections 33(1), 35(1)(b)	Sections 33(1): See comments for Document 1. Section 35(1)(b): I am satisfied disclosure of the information provided in confidence would be reasonably likely to impair the ability of the Agency to obtain similar information in the future for the reasons set out in the Notice of Decision above. Accordingly, I am satisfied this information is exempt under section 35(1)(b). Section 25: See comments for Document 1.
4.	[date]	Email chain (last email sent [date; time])	3	Refused in full Sections 33(1), 35(1)(b)	Refused in full Sections 33(1), 35(1)(b)	Sections 33(1): See comments for Document 1. Sections 35(1)(b): See comments for Document 3.

Document No.	Date of Document	Document Description	No. of Pages	Agency Decision	OVIC Decision	OVIC Comments
						Section 25: See comments for Document 1.
5.	[date]	Email dated [date; time]	2	Refused in full Sections 33(1), 35(1)(b)	Refused in full Sections 33(1), 35(1)(b)	Sections 33(1): See comments for Document 1. Sections 35(1)(b): See comments for Document 3. Section 25: See comments for Document 1.