

Notice of Decision and Reasons for Decision

Applicant:	'DZ9'
Agency:	Ambulance Victoria
Decision date:	3 May 2022
Exemptions considered:	Sections 30(1), 33(1)
Citation:	'DZ9' and Ambulance Victoria (Freedom of Information) [2022] VICmr 27 (3 May 2022)

FREEDOM OF INFORMATION – workplace health and safety of Agency officers – internal working document
– disclosure contrary to the public interest – personal affairs information – 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 a document 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 determined to release information in the document where I am satisfied it is not exempt from release.

I am satisfied certain information in the document is exempt from release under sections 30(1) and 33(1).

As I am satisfied it is practicable to provide the Applicant with an edited copy of the document with exempt information deleted in accordance with section 25, access is granted in part.

A marked up copy of the document has been provided to Agency indicating the information to be released to the Applicant.

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner

3 May 2022

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency seeking access to:

Every document that refers/suggest/implies/clarifies etc that I am either aggressive hostile, has assaulted ambulance staff or others any notations that suggest police should be sent along with ambulance when I am involved in any way.
2. The Agency identified one document falling within the terms of the Applicant's request and refused access in full under sections 30(1) and 35(1)(b) and access in part section 33(1). 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. The document is one page and indicates it is page 1 of a two page document. OVIC staff made enquiries with the Agency to confirm a complete copy of the document was provided to OVIC for review. The Agency confirmed the document is one page only and I accept its submission.
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 their submissions, the Applicant provides a number of reasons for seeking access to the document, including that it will assist their understanding of the Agency's assessment and outcome of an interaction between the Applicant and paramedics who attended the Applicant's home, as well as an opportunity to 'correct the record' if they consider any personal affairs information in the document concerning them is inaccurate.
8. 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.
9. 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.

Preliminary view

10. During the review, the Agency was provided with my preliminary view that certain information in the document is not exempt under sections 30(1) or 35(1)(b). The Agency was provided with a marked-up version of the document, reflecting my preliminary view on the application of these exemptions to the document.
11. In response, the Agency agreed to release additional information in the document in accordance with my preliminary view. In effect, the Agency agreed to release further information to the Applicant.
12. Accordingly, my review will consider the remaining information the Agency exempted from release under sections 30(1) and 33(1).

Review of exemptions

Section 30(1) – Internal working documents

13. Section 30(1) has three requirements:

- (a) the document must disclose matter in the nature of opinion, advice or recommendation prepared by an officer or Minister, or consultation or deliberation that has taken place between officers, Ministers or an officer and a Minister;
- (b) such matter must be made in the course of, or for the purpose of, the deliberative processes involved in the functions of an agency or Minister or of the government; and
- (c) disclosure of the matter would be contrary to the public interest.

14. The exemption does not apply to purely factual material in a document.¹

15. The term ‘officer of an Agency’ is defined in section 5(1). It includes a member of the agency, a member of the agency’s staff, and any person engaged by or on behalf of the agency, whether or not they are subject to the provisions of the *Public Administration Act 2004* (Vic).

Does the document disclose matter in the nature of opinion, advice or recommendation prepared by an officer or Minister, or consultation or deliberation that has taken place between officers, Ministers or an officer and a Minister?

16. For the requirements of section 30(1) to be met, a document must contain matter in the nature of opinion, advice or recommendation prepared by an agency officer, or consultation or deliberation between agency officers.

17. It is not necessary for a document to be in the nature of opinion, advice or recommendation. Rather, the issue is whether release of the document would disclose matter of that nature.²

18. Having carefully reviewed the document, I am satisfied certain information conveys the opinion and advice of Agency officers, and also consultation and deliberation between Agency officers.

Was the document made in the course of, or for the purpose of, the deliberative processes involved in the functions of an agency or Minister or of the government?

19. The term ‘deliberative process’ is interpreted widely and includes any of the processes of deliberation or consideration involved in the functions of an agency, Minister or government.³

20. In *Re Waterford and Department of Treasury (No.2)*,⁴ the former Victorian Administrative Appeals Tribunal held:

... “deliberative processes” [is] wide enough to include any of the processes of deliberation or consideration involved in the functions of an agency... In short, ...its thinking processes — the processes of reflection, for example, upon the wisdom and expediency of a proposal, a particular decision or a course of action.

21. I am satisfied the opinion and advice recorded in the document was provided in the course of, and for the purpose of, the Agency’s deliberative processes with respect to responding to and providing emergency medical services to the Applicant.

¹ Section 30(3).

² *Mildenhall v Department of Education* (1998) 14 VAR 87.

³ *Brog v Department of Premier and Cabinet* (1989) 3 VAR 201 at 208.

⁴ [1984] AATA 67; (1984) 5 ALD 588; 1 AAR 1 at [58].

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

22. I must be satisfied disclosure of the information would not be contrary to the public interest. This requires a 'process of the weighing against each other conflicting merits and demerits'.⁵
23. In doing so, I must consider all relevant facts and circumstances remaining mindful the object of the FOI Act is to facilitate and promote the disclosure of information. Accordingly, I have given weight to the following relevant factors in the context of this matter:⁶
- (a) the right of every person to gain access to documents under the FOI Act;
 - (a) the degree of sensitivity of the issues discussed in the documents and the broader context giving rise to the creation of the documents;
 - (b) the stage of a decision or status of policy development or a process being undertaken at the time the communications were made;
 - (c) whether disclosure of the documents would be likely to inhibit communications between Agency officers, essential for the agency to make an informed and well-considered decision or participate fully and properly in a process in accordance with the Agency's functions and other statutory obligations;
 - (d) whether disclosure of the documents would give merely a part explanation, rather than a complete explanation for the taking of a particular decision or the outcome of a process, which the Agency would not otherwise be able to explain upon disclosure of the documents;
 - (e) the impact of disclosing documents in draft form, including disclosure not clearly or accurately representing a final position or decision reached by the Agency at the conclusion of a decision or process; and
 - (f) the public interest in the community being better informed about the way in which the Agency carries out its functions, including its deliberative, consultative and decision making processes and whether the underlying issues require greater public scrutiny.
24. On the information before me, I am satisfied disclosure of the opinion and advice recorded in the document would be contrary to the public interest for the following reasons:
- (a) Medical information is highly personal and sensitive nature. In this matter, certain information in the document is sensitive in that it concerns the Applicant directly. The information also relates to broader issues, including the identification of risks in the effective treatment of the Applicant, rather than just a clinical assessment of the Applicant.
 - (b) Agency officers need to be able to record and communicate concerns regarding the coordination and management of vulnerable patients in connection with the Agency's provision of emergency medical assistance to patients. Should such information be routinely released under the FOI Act, it is likely Agency officers will feel constrained in the way in which they are able to record and communicate such concerns. This could have serious negative consequences in relation to patient outcomes and the workplace health and safety of Agency officers.
 - (c) While I accept Agency officers are required to provide their opinions and comments with respect to responding to emergency medical events, there is a public interest in them being

⁵ *Sinclair v Maryborough Mining Warden* [1975] HCA 17; (1975) 132 CLR 473 at [485], adopted in *Department of Premier and Cabinet v Hulls* [1999] VSCA 117 at [30].

⁶ *Hulls v Victorian Casino and Gambling Authority* (1998) 12 VAR 483.

able to record and communicate appropriate details of discussions with other Agency officers without concern such information will be disclosed to a patient under the FOI Act. While I acknowledge the Applicant's strong personal interest in obtaining full access to the document, I am mindful of ensuring the Agency has access to all relevant information to inform its response to emergency medical events and the provision of time critical medical services to patients. Therefore, I am satisfied the impact of routinely disclosing certain information in the document would undermine the Agency's process in developing patient plans.

25. Having considered the content and context of the document, on balance, I am satisfied disclosure of certain information in the document would be contrary to the public interest and is exempt under section 30(1).

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

26. 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**);⁷ and
- (b) such disclosure would be 'unreasonable'.

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

27. 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.⁸
28. 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.⁹
29. The document includes the name, position title, signature, contact and/or location details of third parties. Therefore, I am satisfied this information constitutes personal affairs information for the purposes of section 33.
30. The document also records the personal affairs information of the Applicant.

Would disclosure of the personal affairs information be unreasonable?

31. The concept of 'unreasonable disclosure' involves balancing the public interest in the disclosure of official information with the interest in protecting the personal privacy of a third party in the circumstances of a matter.
32. In *Victoria Police v Marke*,¹⁰ the Victorian Court of Appeal 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'.¹¹ The Court further held, '[t]he protection of privacy, which lies at the heart of [section] 33(1), is an

⁷ Sections 33(1) and (2).

⁸ Section 33(9).

⁹ *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].

¹⁰ [2008] VSCA 218 at [76].

¹¹ *Ibid.*

important right that the FOI Act properly protects. However, an individual's privacy can be invaded by a lesser or greater degree'.¹²

33. In relation to the personal affairs information of the Applicant, where this information is not intertwined with the personal affairs of a third party, I am satisfied it is not exempt under section 33(1). While I acknowledge the information is sensitive in nature, given the purpose and context of the document, I consider there is a public interest in this personal information being accessible to the Applicant while also balancing the need to ensure the workplace health and safety of Agency officers.
34. In determining whether disclosure of the personal affairs information of Agency officers would be unreasonable in the circumstances, I have considered the following factors:

(a) The nature of the personal affairs information and the circumstances in which it was obtained

The information was recorded in the context of the Agency carrying out its emergency medical care functions.

The document contains operational notes made by Agency officers in the course of providing emergency medical care to the Applicant.

I consider the information is sensitive given the purpose and context of the document.

In my view the purpose of the document is to ensure the workplace health and safety of Agency officers when attending patients in emergency medical situations and ensure the effective and safe treatment of patients.

(b) The Applicant's interest in the information

The FOI Act provides a general right of access that can be exercised 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 under section 33(1).¹³

I have considered information provided by the Applicant in support of their review application, including their submissions and reasons for seeking access to the document in full.

I acknowledge the Applicant's personal interest in obtaining access to the document as described in their application and submission, including to be able to correct any information in the document they consider is incorrect or not accurate.

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

The Applicant's interest in obtaining access to the document is personal in nature.

I do not consider there is any information before me to suggest that the public interest would be promoted by the release of the personal affairs information of any third party in the document.

I consider there is a public interest in the non-disclosure of such information in circumstances where it is necessary to record and communicate information critical to the Agency being able to carry out its emergency medical care functions safely and effectively.

¹² Ibid at [79].

¹³ *Victoria Police v Marke* [2008] VSCA 218 at [104].

- (d) Whether the individuals to whom the information relates object, or would be 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 the relevant third party that an FOI request has been received seeking access to documents containing their personal information and seek their view as to whether disclosure of the document should occur.¹⁴ However, this obligation does not arise in circumstances, including where it is not practicable to do so.¹⁵

The Agency advised it is not practicable to consult with the relevant third parties and I agree consultation is not practicable in the circumstances of this matter. Having considered the purpose and context of the document, I am satisfied the relevant third parties would likely object to disclosure of their personal affairs information under the FOI Act. However, while a relevant consideration, this is not a determinative factor.

- (e) Whether disclosure of the information would or would be reasonably likely to endanger the life or physical safety of any person¹⁶

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 consider whether the disclosure of the information would, or would be reasonably likely to, endanger the life or physical safety of any person.¹⁷ Having considered carefully the purpose and context of the document, I have taken this factor into account in this matter.

35. Having considered the factors set out above, on balance, I have determined disclosure of the personal affairs information of third parties in the document would be unreasonable in the circumstances. Accordingly, this information is exempt from release under section 33(1).
36. However, I have determined information that specifically concerns the personal affairs information of the Applicant and is not intertwined with the personal affairs of a third party is not exempt under section 33(1).

Section 35(1)(b) – Information provided in confidence to an agency

37. Where I have determined information in the document is exempt from release under section 30(1), it is not necessary to also consider the application of section 35(1)(b).

Section 25 – Deletion of exempt or irrelevant information

38. 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.
39. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'¹⁸ 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 25.¹⁹

¹⁴ Section 33(2B).

¹⁵ Section 33(2C).

¹⁶ Section 33(2A).

¹⁷ Section 33(2A).

¹⁸ *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].

¹⁹ *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].

40. I am satisfied it is practicable to provide the Applicant with an edited copy of the document with exempt information deleted in accordance with section 25, as to do so would not require substantial time and effort, and the edited document would retain meaning for the Applicant.

Conclusion

41. On the information before me, I am satisfied certain information in the document is exempt from release under sections 30(1) and 33(1).
42. As I am satisfied it is practicable to provide the Applicant with an edited copy of the document with exempt information deleted in accordance with section 25, access is granted in part.
43. A marked up copy of the document has been provided to Agency indicating the information to be released to the Applicant.

Review rights

44. If either party to this review is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.²⁰
45. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.²¹
46. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.²²
47. 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.
48. 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.²³

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.

²⁰ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

²¹ Section 52(5).

²² Section 52(9).

²³ Sections 50(3F) and 50(3FA).