

Notice of Decision and Reasons for Decision

Applicant:	'EA6'
Agency:	University of Melbourne
Decision date:	2 February 2022
Exemption considered:	Section 33(1)
Citation:	'EA6' and University of Melbourne (Freedom of Information) [2022] VICmr 33 (2 February 2022)

FREEDOM OF INFORMATION – workplace documents – salary amounts – personal affairs information of a third party – possible reidentification of a third party – 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 is the same as the Agency's decision.

I am satisfied the document is exempt under section 33(1).

I am satisfied it is not practicable to provide the Applicant with an edited copy of the document with exempt information deleted in accordance with section 25. Accordingly, access to document is refused in full.

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner

2 February 2022

Reasons for Decision

Background to review

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

I am requesting the annual income levels for the 50 highest employee incomes, excluding redundancy payments, for two financial years: [dates]; and [dates].”
2. The Agency produced one document containing the requested information under section 19 and refused access to the document in full under sections 33(1) and 34(4)(a)(ii). 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.
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 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.
8. 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

9. 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**);¹ and
 - (b) such disclosure would be ‘unreasonable’.

Does the document contain the personal affairs information of third parties?

10. Information relating to a third party’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

¹ Sections 33(1) and (2).

² Section 33(9).

11. 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
12. For example, the removal of a third party's name from a document may not necessarily remove the possibility of a third party being reidentified if a document is released under the FOI Act. This is particularly an issue where other information about a third party is publicly or otherwise available and can be used to reidentify a third party from seemingly 'deidentified' information released under the FOI Act.
13. Reidentification of a third party also presents as an issue where an applicant holds or has the capacity to acquire more detailed information or personal knowledge about a third party.⁴ As such, the information would not have the same relevance for others who are not in possession of or have access to such peripheral information to enable reidentification. In this case, [due to the Applicant's connection to the university sector], I consider it is reasonable that combined with their existing knowledge [redacted details of Applicant's FOI request] and other publicly available information regarding roles and salaries, the Applicant would be able to reidentify one or more of the third parties to reveal their individual salaries.
14. In *Asher v Department of State & Regional Development*,⁵ the Victorian Civil and Administrative Tribunal (VCAT) states 'it seems to be generally accepted that the quantum of remuneration received by an officer for his or her discharge of government duties is information relating to that officer's personal affairs'.
15. Therefore, I am satisfied the release of the document would disclose the personal affairs information of third parties for the purpose of section 33(1).

Would disclosure of the personal affairs information be unreasonable?

16. The concept of 'unreasonable disclosure' involves balancing the public interest in the disclosure of official information with the interest in protecting an individual's right to personal privacy in the circumstances.
17. In *Victoria Police v Marke*,⁶ 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'.⁷ The Court further held, '[t]he protection of privacy, which lies at the heart of [section] 31, is an important right that the FOI Act properly protects. However, an individual's privacy can be invaded by a lesser or greater degree'.⁸
18. Whether or not an agency officer's personal affairs information is exempt under section 33(1) must be considered in the context of the particular circumstances of each matter.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 See for example, *Commissioner of State Revenue v Tucker (Review and Regulation)* [2021] VCAT 238 in which the FOI Applicant was an employee of the agency and sought financial information relating to the agency, agency officers and other third parties.

⁵ [2002] VCAT 609 at [9], referring to *Ricketson v Royal Children's Hospital* (1989) VAR 10 at 12 per Judge Hanlon; and *Milthorpe v Mt Alexander Shire Council* (1997) 12 VAR 105 at 110.

⁶ [2008] VSCA 218 at [76].

⁷ *Ibid.*

⁸ *Ibid* at [79].

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

19. Therefore, it is necessary to consider 'all matters relevant, logical and probative to the existence of conditions upon which the section is made to depend'.¹⁰
20. In determining whether disclosure of the position titles of third parties 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 the information was obtained by the Agency

The nature of the information is the names and salary information of Agency officers. VCAT has generally accepted there is nothing particularly sensitive about matters occurring or arising out of the course of one's official duties.¹¹ Subject to an agency demonstrating that special circumstances apply, it is generally not unreasonable to disclose personal affairs information of agency officers in official documents of an agency where it relates to those persons in their professional capacity.

I note the Agency has previously provided submissions in relation to the circumstances in which this type of personal financial information is obtained by the Agency. I also note the subject matter of the Applicant's request and the Agency's decision. Therefore, I accept the personal affairs information in the document is sensitive.

In my view, special circumstances exist in this matter. I consider the personal affairs information is recorded in the context of each Agency officer's personal salary details in relation to carrying out their employment duties as Agency employees. The information in the document is contained in the third parties' payment summaries that created and provided to the [Australian Government Agency] for personal tax administration purposes.

(b) The Applicant's interest in the information and whether their purpose for seeking the information is likely to be achieved by its disclosure

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.¹²

I acknowledge the Applicant's personal interest in the distribution of public funds and the salaries paid at Group of Eight universities. I note they seek access to the requested information to further public discussions about the nature of higher education institutions and the remuneration of senior university employees.

While I accept disclosure of the documents may serve the Applicant's personal interest in obtaining salary information about senior Agency employees, I have not given considerable weight to this factor given the other factors considered.

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

I acknowledge the Applicant's personal interest in seeking access to the document and the overall public interest in transparency and accountability in relation to senior public sector employees, including university employees. However, I am of the view the Agency provides sufficient information through existing financial reporting and audit measures to meet the public interest in transparency and accountability. For example, the Agency publishes the

¹⁰ [2008] VSCA 218 at [104].

¹¹ *Re Milthorpe v Mt Alexander Shire Council* (1997) 12 VAR 105.

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

remuneration of employees from the Agency's council in bands of \$10,000, and in bands of \$15,000 for the Agency's executive officers in its annual report.

Accordingly, I am not satisfied there is an overriding public interest in the release of the personal affairs information that outweighs the personal privacy of the Agency officers specified in the Applicant's request.

I have given considerable weight to this factor.

(d) Whether any individuals to whom the information relates object or would be likely to object to the release of the information

The Agency consulted with certain third parties, whose information is contained in the document. Those third parties objected to the release of their personal affairs information under the FOI Act. The Agency was unable to contact all third parties due to the number of individuals named in the document. Despite this fact, I consider it is reasonably likely the relevant third parties would object to the release of their personal affairs information under the FOI Act given it concerns their personal financial information.

Having considered the nature of the personal financial information, the Applicant's personal interest in the information despite other similar salary information being publicly available and the objections and likely objection to its release under the FOI Act, I have given considerable weight to this factor.

(e) The likelihood of further disclosure of information, if released

As stated above, the FOI Act does not impose any conditions or restrictions on an applicant's use of documents disclosed under the Act. Accordingly, it is necessary to consider the likelihood and potential effects of further dissemination of a third party's personal affairs information if a document is released.

I have considered the likelihood of the document being further disseminated by the Applicant, and the effects such disclosure would have on the privacy of the third parties given the nature of the document and its content.

I consider it is reasonably likely the document or information in the document would be disseminated further and would impact upon the personal privacy of the relevant third parties. In combination with the above factor, I have given considerable weight to this factor.

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

I must also consider whether disclosure of the personal affairs information would or would be reasonably likely to endanger the life or physical safety of any person.¹³ The term 'any person' is broad and extends to any relevant endangerment involving the safety of an applicant, a related third party or any other person. However, I do not consider this to be a relevant factor.

21. Having weighed up the above factors, on balance, I am satisfied disclosure of the personal affairs information of the third parties in the document would be unreasonable in the circumstances.
22. As I have determined the document is exempt under section 33(1), it is not necessary for me to also consider the application of section 34(4)(a)(ii).

¹³ Section 33(2A).

Section 25 – Deletion of exempt or irrelevant information

23. 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.
24. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'¹⁴ 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 25.¹⁵
25. I have considered the effect of deleting exempt information from the documents. I am satisfied it is not practicable to delete such information as to do so would render the document meaningless.

Conclusion

26. On the information before me, I am satisfied the requested document is exempt under section 33(1).
27. As I am satisfied it is not practicable to provide the Applicant with an edited copy of the document with exempt information deleted in accordance with section 25, access to the document is refused in full.

Review rights

28. If the Applicant is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.¹⁶
29. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹⁷
30. 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.
31. 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.¹⁸

¹⁴ *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].

¹⁵ *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].

¹⁶ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

¹⁷ Section 52(5).

¹⁸ Sections 50(3F) and (3FA).
