

Notice of Decision and Reasons for Decision

Applicant:	'EC9'
Agency:	Department of Education and Training
Decision date:	8 June 2022
Exemptions considered:	Sections 33(1), 35(1)(b)
Citation:	'EC9' and Department of Education and Training (Freedom of Information) [2022] VICmr 53 (8 June 2022)

FREEDOM OF INFORMATION – parent request for child’s school file – student record – personal affairs information of third parties – disclosure unreasonable – information provided in confidence – disclosure contrary to public interest – search concerns – 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 the documents are exempt from release under sections 33(1) and 35(1)(b).

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

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

8 June 2022

Reasons for Decision

Background to review

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

I was after any documents (regarding and containing information about myself), that my [relationship descriptor] has submitted to both the [named primary school] (Prep til Grade 6, [year range]) and [named secondary college] (Year 7, [year]).

Where my [child] [named person] previously attended and now attends.

[Redacted - Contextual information regarding the Applicant's concerns about the nature and impact of information provided to the relevant schools]

2. The Agency identified three documents falling within the terms of the Applicant's request and granted access to one document in full and refused access to two documents in part under sections 33(1) and 35(1)(b). 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. The Applicant indicated they do not seek access to the personal affairs information of certain third parties. Accordingly, this review relates to the documents to which the Agency granted access in part and any third party information in these documents will be dealt with as irrelevant information under section 25, which is discussed below.
5. I have examined a copy of the documents subject to review.
6. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
7. I have considered all communications and submissions received from the parties.
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.

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

10. 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.
11. In accordance with section 61B(3), these concerns were addressed as part of the review.
12. During the review, the Agency located additional documents relevant to the Applicant's FOI request and provided the documents directly to them.

13. OVIC staff made further enquiries with the Agency to address the Applicant's concerns. The outcome of those enquiries was communicated to the Applicant.
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 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 (a **third party**);¹ and
 - (b) such disclosure would be 'unreasonable'.

Do the documents contain personal affairs information of a third party?

16. 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.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 FOI Act does not place any restrictions on an applicant's use or dissemination of documents obtained under FOI, this is to be interpreted by reference to the capacity of any member of the public to identify a third party.³
18. The exempt information relates to the personal affairs information of third parties including their names, email address, telephone number, mobile number, residential address, email address, relationship descriptors, signatures, position titles and other personal identifying information. I am satisfied this information relates to the personal affairs information of third parties.
19. I acknowledge the Applicant may know some of the third parties mentioned in the documents. However, even where an applicant claims to know the third parties involved, disclosure of personal affairs information may still be unreasonable.⁴

Would disclosure of the personal affairs information be unreasonable?

20. 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 an individual in the particular circumstances.
21. In *Victoria Police v Marke*,⁵ 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'.⁶ The Court further held, '[t]he protection of privacy, which lies at the heart of [section] 33(1), is an

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

⁵ [2008] VSCA 218 at [76].

⁶ *Ibid.*

important right that the FOI Act properly protects. However, an individual's privacy can be invaded by a lesser or greater degree'.⁷

22. In determining whether disclosure of the personal affairs information would be unreasonable in the circumstances, I have considered the following factors:

(a) The nature of the personal affairs information

The information in the documents was provided and documented for the purpose of recording the student's enrolment information with their school and includes information that relates to the personal affairs of several third parties. In the circumstances of this matter, I consider this information which relates to persons other than the Applicant is personal and sensitive in nature.

Further, the information to which the Agency access is information is not available to the public.

(b) The circumstances in which the information was obtained

The Agency obtained the personal affairs information in connection with its provision of education services to the Applicant's child.

Having considered the circumstances in which the information was obtained and is held by the Agency, I am satisfied it was provided by the third parties with an expectation of confidentiality noting the duty of care that exists between a school and a student in terms of a student's wellbeing and safety while in the care and under the supervision of the school.

(c) 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).⁸

The Applicant seeks access to the exempt information in the documents as [they] want to know what information has been provided to [their] child's school about [them].

While I acknowledge the Applicant's interest in obtaining access to the requested documents in full, having reviewed the information, I do not consider the Applicant's stated interest in obtaining access would be met given it relates to third parties rather than to the Applicant.

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

I do not consider there is a broader public interest to be promoted by releasing the personal affairs information of third parties. Where an applicant's motivation for seeking access to personal affairs information of a third party is more closely related to an applicant's personal interest or curiosity in obtaining the information without a broader public interest, access is more likely to be unreasonable.⁹

As such, I consider the Applicant's interest in the information would serve a personal interest only.

⁷ Ibid at [79].

⁸ *Victoria Police v Marke* [2008] VSCA 218 at [104].

⁹ *Gunawan v Department of Education* [1999] VCAT 665.

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

The FOI Act does not place any restrictions on an applicant's use or dissemination of documents obtained under FOI.¹⁰

Accordingly, I have considered the likelihood of the personal affairs information in the documents being further disseminated, if disclosed, and the effects broader disclosure of this information would have on the privacy of the relevant third parties.

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 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 that person an FOI request has been received for documents containing their personal information and seek their view as to whether disclosure of the documents should occur.¹¹

However, this obligation does not arise if:

- (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
- (c) it is not practicable to do so.¹²

The Agency determined it was not practicable to consult with the relevant third parties to obtain their views regarding disclosure of their personal affairs information. Having considered the information before me and the circumstances in which it was obtained, I am of the view they would be likely to object to the release of the information under the FOI Act.

(g) Whether disclosure of the information would or would be reasonably likely to endanger the life or physical safety of any person¹³

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.¹⁴

There is no information before me to suggest this is a relevant factor in this matter.

23. In balancing the above factors, I have determined disclosure of personal affairs information of the third parties to which the Agency has refused access under section 33(1) would be unreasonable in the circumstances and is exempt from release under section 33(1).

¹⁰ Ibid at [68].

¹¹ Section 33(2B).

¹² Section 33(2C).

¹³ Section 33(2A).

¹⁴ Section 33(2A).

24. The Schedule of Documents in **Annexure 1** sets out my decision in relation to section 33(1).

Section 35(1)(b) – Information obtained in confidence

25. The Agency refused access to Document 3 in part under section 35(1)(b).

26. A document is exempt from release 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 the information obtained in confidence?

27. Whether information communicated by an individual to an agency was communicated in confidence is a question of fact.¹⁵
28. In doing so, it is necessary to consider the position from the perspective of the communicator, noting confidentiality can be expressed or implied from the circumstances of a matter.¹⁶
29. The Agency determined it was not practicable to consult with the third parties to obtain their views regarding the confidentiality of the information they provided to the Agency. I agree consultation would not be practicable in the circumstances.
30. Having considered the information before me and the context in which it was obtained by the Agency, I am satisfied the third parties would have reasonably intended that the information they voluntarily provided to the Agency was done so with an expectation of confidentiality.
31. Accordingly, I am satisfied the first requirement of section 35(1)(b) is met.

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

32. Section 35(1)(b) also requires I consider whether the Agency would be impaired from obtaining similar information in the future if the information were to be disclosed under the FOI Act. This involves considering whether others in the position of the communicator would be reasonably likely to be inhibited or deterred from providing similar information to the Agency in the future should the information be disclosed.
33. The public interest test in section 35(1)(b) is narrow, in that it is directed toward the impact release would have on an agency's ability to obtain the same type of information in the future. I note the exemption will not be made out of an agency's impairment goes no further than showing potential communicators of the information may be less candid than they would otherwise have been.¹⁷
34. In determining whether disclosure would be contrary to the public interest, I must consider whether disclosure of the confidential information would be reasonably likely to impair the Agency's ability to obtain similar information in the future. The provision does not permit me 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

¹⁵ *Ryder v Booth* [1985] VR 869 at [883]; *XYZ v Victoria Police* [2010] VCAT 255 at [264].

¹⁶ *XYZ v Victoria Police* [2010] VCAT 255 at [265].

¹⁷ *Smeaton v Victorian WorkCover Authority* [2012] VCAT 1549 at [69], approving *Birnbauer v Inner and Eastern Health Care Network* [1999] 16 VAR 9.

is confined to the effect disclosure would have on the provision of similar communication to an agency in the future.

35. In relation to the confidential information provided to the Agency by the third parties, I consider disclosure of this information would be reasonably likely to impair the ability of the Agency to obtain similar information in the future if the Agency was not able to provide an assurance of confidentiality. This would have a detrimental impact on the Agency's ability to effectively ensure the ongoing wellbeing of its students.
36. Accordingly, I am satisfied the information to which the Agency has refused access under section 35(1)(b) is exempt from release under section 35(1)(b).
37. The Schedule of Documents in **Annexure 1** outlines my decision in relation to 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. Given my decision is the same as the Agency's decision and it granted access to the documents in part in accordance with section 25, I consider it remains practicable to provide the Applicant with an edited copy of the documents with exempt information deleted.

Conclusion

40. On the information before me, I am satisfied the exemptions in sections 33(1) and 35(1)(b) apply to the documents.
41. As I am satisfied it is practicable to provide the Applicant with an edited copy of the documents with exempt information deleted in accordance with section 25, access is granted in part.

Review rights

42. If either party to this review is not satisfied with my decision, they are entitled to apply to the Victorian Civil and Administrative Tribunal (**VCAT**) for it to be reviewed.¹⁸
43. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹⁹
44. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.²⁰
45. 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.
46. 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.²¹

¹⁸ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

¹⁹ Section 52(5).

²⁰ Section 52(9).

²¹ Sections 50(3F) and 50 (3FA).

Annexure 1 – Schedule of Documents

Document No.	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
1.	[Redacted]	7	Released in full	Not subject to review	
2.	Enrolment forms booklet	20	Release in part Section 33(1)	Release in part Sections 33(1), 25 My decision is the same as the Agency's decision.	<p>Section 33(1): I am satisfied disclosure of the personal affairs information of third parties in this document would be unreasonable in the circumstances for the reasons outlined in the Notice of Decision above. Accordingly, the information in the document is exempt from release under section 33(1).</p> <p>Section 25: I am satisfied it is practicable to provide the Applicant with an edited copy of this document with exempt and information deleted in accordance with section 25.</p>
3.	Letter	2	Release in part Section 33(1), 35(1)(b)	Release in part Sections 33(1), 35(1)(b) My decision is the same as the Agency's decision.	<p>Section 33(1): See comments for Document 2.</p> <p>Section 35(1)(b): I am satisfied the document records information communicated by a third party to the Agency in confidence and its disclosure would be contrary to the public interest as it would be reasonably likely to impair the ability of the Agency to obtain similar information in the future. Accordingly, the information in the document is exempt from release under section 35(1)(b).</p> <p>Section 25: See comments for Document 2.</p>