

Notice of Decision and Reasons for Decision

Applicant: 'ED5'
Agency: Department of Education and Training
Decision date: 16 May 2022
Exemption considered: Section 33(1)
Citation: 'ED5' and Department of Education and Training (Freedom of Information) [2022] VICmr 58 (16 May 2022)

FREEDOM OF INFORMATION – employment records – school records – allegations of historical sexual abuse – teacher – reports – student attendance sheets

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.

On the information before me, I am satisfied certain information in the documents is exempt from release under section 33(1).

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

16 May 2022

Reasons for Decision

Background to review

1. The Applicant, via their legal representative, made a request to the Agency seeking access to:

...file notes, reports and any other documentation relating to our client [Name].

Please provide all school records, reports and client attendance sheets for [Name].

Please also provide our office with an appointment history, complaints history, employment history, and all other relevant documentation relating to [Name].
2. The Agency identified three documents falling within the terms of the Applicant's request and granted access to a small amount of information in the documents. The remainder of the information was exempted from release under sections 33(1), 35(1)(b) and 38. 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 documents 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.

Complaint concerning the Agency's document search

9. The Applicant also raised concerns regarding the Agency's search for documents. The Applicant advised that limited information about their time at the school as a student could be located. In particular, the Applicant seeks access to attendance records for all years of their attendance at the school.
10. In accordance with section 61B(3), the Applicant's concerns are addressed as part of this review and OVIC made inquiries with the Agency about its document searches.
11. On the information before me, I am satisfied the Agency undertook a thorough and diligent document search. I note the requested documents date from between [year] and [year] and it is likely such student records no longer exist. While I am unable to determine document retention practices at that time, I note that schools are not currently required to retain all student attendance records. I also note it is likely there are no personnel still at the school from that time that would have any knowledge regarding how the school managed and destroyed its records during the relevant period.

Review of exemptions

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

12. 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 individuals other than the Applicant?

13. 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 this may be reasonably determined.²
14. A document will disclose a third party’s personal affairs information if it is capable, either directly or indirectly, of identifying that person.
15. The FOI Act does not place any restrictions on an applicant’s use or dissemination of documents obtained under FOI.
16. The documents subject to review are employment and disciplinary records relating to a named teacher at the applicant’s former school. I am satisfied this is personal affairs information for the purposes of the FOI Act.

Would disclosure of the personal affairs information be unreasonable?

17. The concept of ‘unreasonable disclosure’ involves balancing the public interest in the disclosure of official information with the interest in protecting a person’s personal privacy in the particular circumstances.
18. In *Victoria Police v Marke*,³ 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’.⁴ The Court further held, ‘[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 by a lesser or greater degree’.⁵
19. 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

While the information in the documents varies in sensitivity, it all relates to the employment of a third party.

¹ Sections 33(1) and 33(2).

² Section 33(9).

³ [2008] VSCA 218 at [76].

⁴ Ibid.

⁵ Ibid at [79].

The documents include information generated by the Agency (for example salary records), information supplied by the third party to the Agency about themselves and information provided by other third parties to the Agency relating to the first third party.

I consider such records are personal and, in the context of this matter, sensitive.

(b) The circumstances in which the information was obtained

The information was obtained by the Agency in relation to a third party's employment.

I consider members of the community would expect employers to take reasonable steps to maintain the confidentiality of such information, including historical information.

(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).⁶

I note the sensitive nature underpinning the Applicant's request and have given it considerable weight in my decision.

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

I consider there is no public interest that would be promoted from disclosure, rather disclosure relates to the Applicant's private interest only.

Further, I consider the public interest in this matter lies in maintaining the confidentiality of employment records. Maintaining the confidentiality is essential for employers to maintain the trust of their employees.

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

As stated above, the FOI Act does not place any restrictions on an applicant's use or dissemination of documents obtained under FOI.

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

I note the purpose for which the documents are sought and that it is unlikely the documents will be further disseminated. However, I consider the information is personal and sensitive in the circumstances of this matter and, if disclosed, could cause distress and anxiety to certain individuals.

(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

⁶ *Victoria Police v Marke* [2008] VSCA 218 at [104].

view as to whether disclosure of the document should occur.⁷ 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.⁸

The Agency advised it did not consult with any third parties as it determined to do so was not practicable in the circumstances. I agree it is not practicable to consult with the third parties given the documents are over [number] years old and the likelihood consent would not be provided.

- (g) Whether disclosure of the information would or would be reasonably likely to endanger the life or physical safety of any person⁹

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.¹⁰ I do not consider this is a factor in this decision.

- 20. Weighing the above factors, I have determined it would be unreasonable to release the personal affairs information in the documents. It is therefore exempt under section 33(1).

Section 25 – Deletion of exempt or irrelevant information

- 21. 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.
- 22. Determining what is ‘practicable’ requires consideration of the effort and editing involved in making the deletions ‘from a resources point of view’¹¹ 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 25.¹²
- 23. I have considered the effect of deleting exempt information from the documents. In my view, it is practicable for the Agency to delete the exempt information, because it would not require substantial time and effort, and the edited documents would retain meaning.

Conclusion

- 24. On the information before me, I am satisfied certain information in the documents is exempt from release under section 33(1).

⁷ Section 33(2B).

⁸ Section 33(2C).

⁹ Section 33(2A).

¹⁰ Section 33(2A).

¹¹ *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].

¹² *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].

25. 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

26. 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.¹³
27. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹⁴
28. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹⁵
29. 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.
30. 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.¹⁶

When this decision takes effect

31. My decision does not take effect until the Agency's 14 day review period expires.
32. If a review application is made to VCAT, my decision will be subject to any VCAT determination.

¹³ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

¹⁴ Section 52(5).

¹⁵ Section 52(9).

¹⁶ Sections 50(3F) and 50(3FA).

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
1.	Various dates	Personnel file	97	Release in part Sections 33(1), 35(1)(b)	Release in part Sections 33(1), 25 The document is to be released with the information identified by the Agency deleted in accordance with section 25.	Section 33(1): I am satisfied most information in the document is exempt from release under section 33(1) for the reasons set out in my Notice of Decision above. As I am satisfied the document is exempt under section 33(1), I have not further considered the application of section 35(1)(b). Section 25: I am satisfied it is practicable to delete exempt information from the document in accordance with section 25.
2.	[date]	[School] – [Name] – School Reports, Semester Two, [Year]	9	Released in full	Not subject to review	
3.	Various dates	Additional file of [Name]		Released in part Sections 33(1), 35(1)(b), 38	Release in part Sections 33(1), 25 The document is to be released with the information identified by the Agency deleted in accordance with section 25.	Section 33(1): See comments for Document 1. As I am satisfied the document is exempt from release under section 33(1), I have not further considered the application of sections 35(1)(b) or 38. Section 25: See comments for Document 1.