

Notice of Decision and Reasons for Decision

Applicant:	'ER2'
Agency:	Department of Education and Training
Decision date:	29 June 2022
Exemptions and provisions considered:	Sections 30(1), 33(1) and 25
Citation:	'ER2' and Department of Education and Training (Freedom of Information) [2022] VICmr 183 (29 June 2022)

FREEDOM OF INFORMATION – school records – internal working documents – disclosure contrary to the public interest – personal affairs information – disclosure unreasonable – COVID-19

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 in that I am satisfied certain information contained in the documents is exempt under sections 33(1) and 30(1).

As it is practicable to provide the Applicant with an edited copy of the documents with irrelevant and exempt information deleted in accordance with section 25, access to documents 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.

Sven Bluemmel
Information Commissioner

29 June 2022

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency seeking access to documents in the possession of the Agency relating to their[child]'s school.
2. Following consultation with the Agency, the Applicant clarified the terms of their request to:
 - All enrolment forms including but not limited to and including all or any [court orders]
 - All but not limited to, correspondence, emails, documents, notes, phone call records, pertaining to enrolment of [student]] at [school] including but not limited to, family court orders, family violence or intervention orders (inclusive)
 - All but not limited to, correspondence, emails, notes, [document type], phone call records pertaining to notification of [student], being a close covid contact while at School
 - All but not limited to, correspondence, emails, notes, phone call records pertaining to [student]'s participation in [an assessment].
 - All but not limited to, correspondence, emails, notes, phone call records for [student]'s attendance and arrival and departure on [date]
 - [Date ranges provided]
3. The Agency identified 14 documents falling within the terms of the Applicant's request and decided to grant access to eight documents in full and six documents in part. The Agency relied on the exemptions under sections 30(1) and 33(1) to refuse access to information in the documents. The Agency's decision letter sets out the reasons for its decision.

Applicant's concerns regarding adequacy of search and missing documents

4. Alongside their review application, the Applicant raised concerns regarding the Agency's handling of their FOI request, including a claim that certain documents were missing.
5. In accordance with section 61B(3), the Applicant's complaint concerns were addressed as part of the review.
6. OVIC staff made enquiries with the Agency in relation to the Agency's handling of the FOI request and adequacy of its searches.
7. The Agency undertook further document searches and located one additional document falling within the terms of the Applicant's request. The Agency decided to release this document in full. For completeness, it is listed in the Schedule of Documents in **Annexure 1** as Document 17.
8. Following the Agency's additional search for documents, I am satisfied the Agency has conducted a thorough and diligent search for relevant documents based on the terms of the Applicant's request.

Review application

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

11. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
12. I have considered all communications and submissions received from the parties.
13. 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.
14. 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.
15. In conducting a review under section 49F, section 49P requires that I make a new or 'fresh decision'. Therefore, my review does not involve determining whether the Agency's decision is correct, but rather requires my fresh decision to be the 'correct or preferable decision'. This involves ensuring my decision is correctly made under the FOI Act and any other applicable law in force at the time of my decision.

Review of exemptions

Section 30(1) – Internal working documents

16. The Agency applied the exemption under section 30(1) to certain material contained in Document 10.
17. 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; and
 - (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.
18. The exemption does not apply to purely factual material in a document.¹
19. I must also be satisfied releasing this information is not contrary to the public interest. This requires a 'process of the weighing against each other conflicting merits and demerits'.²

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?

20. 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.

¹ Section 30(3).

² *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].

21. 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.³
22. Document 10 contains speaking notes for the school's Principal to assist them in communicating matters related to school-based contacts of a positive COVID-19 case to the broader school community. The information includes communications and options considered but not necessarily adopted.
23. The Agency sought to exempt a portion of the typed speaking notes, which appear to have been replaced by handwritten notes. The handwritten notes indicate updated procedural information to be communicated by the Principal related to the specific circumstances at that point in time. I am satisfied this information is deliberative in nature.
24. Some of the handwritten notes are in the nature of advice related to matters to be communicated by the Principal in line with the typed speaking notes.
25. I am satisfied the remaining notes constitute matter in the nature of opinion, advice or recommendation of an Agency officer.

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?

26. 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.⁴
27. In *Re Waterford and Department of Treasury (No.2)*,⁵ 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.
28. I am satisfied the implementation of public health advice and communications with members of the school community in relation to COVID-19 are part of the Agency's functions in the provision of school services including COVID-19 testing and notification requirements.

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

29. In deciding whether release is contrary to the public interest, I must consider all relevant facts and circumstances remaining mindful that the object of the FOI Act is to facilitate and promote the disclosure of information.
30. In deciding whether the information exempted by the Agency would be contrary to the public interest, I have given weight to the following relevant factors:⁶
 - (a) the right of every person to gain access to documents under the FOI Act;
 - (b) the degree of sensitivity of the issues discussed in the document and the broader context giving rise to the creation of the document;
 - (c) the stage or a decision or status of policy development or a process being undertaken at the time the communications were made;

³ *Mildenhall v Department of Education* (1998) 14 VAR 87.

⁴ *Brog v Department of Premier and Cabinet* (1989) 3 VAR 201 at 208.

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

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

- (d) whether disclosure of the document 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;
- (e) whether disclosure of the document 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;
- (f) the impact of disclosing document 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
- (g) 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.

31. The Agency submits:

...the release of these comments may give merely a part explanation rather than a complete explanation as to why these comments were made; it is unclear whether this is a draft version of the document given notes made; and releasing these comments may undermine how the school manages COVID cases.

...

In relation to the public interest argument, we believe that it is necessary to protect on a broader spectrum how COVID is managed in schools [and] how parents are notified of positive cases or whether they are close contacts. If the opinions, advice and recommendations were released it may hinder the way the school approaches parents regarding COVID cases and how they manage this communication ongoing.

...

- 32. The document was prepared in November 2021 to facilitate communications from the school's Principal to the broader school community in relation to COVID-19 testing and notification requirements.
- 33. The exempted information contains internal communications and options considered but not necessarily adopted and they reflect matters communicated or to be communicated to the school community related to school-based contacts of a positive COVID-19 case and the school's response thereto.
- 34. There is information before me which indicates that if this information were to be released under FOI, it would be likely to inhibit communications between Agency officers, essential for the agency to make informed and well-considered decisions in relation to implementing COVID-19 protocols in the future.
- 35. Further, in the circumstances of this matter, I consider release of this information is likely to impact the willingness of Agency officers to participate fully and properly in future processes in accordance with the Agency's functions and other statutory obligations.
- 36. Disclosure serves the public interest where it can assist members of the public in their understanding and scrutiny of public health responses implemented by the Government in response to COVID-19. While I acknowledge the broader public interest in transparency around COVID-19 protocols, particularly where this relates to the supervision of children, given the specificity of the handwritten notes to the relevant school, I consider there is limited public interest in their release.

37. On balance, I consider it would be contrary to the public interest to disclose this information from the document.
38. Accordingly, I am satisfied the information is exempt under section 30(1).
39. The Schedule of Documents in **Annexure 1** sets out my decision on the application of section 30(1) to the document.

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

40. 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;⁷ and
 - (b) such disclosure would be ‘unreasonable’.

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

41. 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.⁸
42. The Agency has exempted the names, contact details, signatures, initials, addresses, employment details and education details of several third parties.
43. An ID number has been exempted from Document 9. I am not satisfied this number constitutes the personal affairs information of any third party however, I consider it is irrelevant to the Applicant’s request as it does not provide substantive information and is purely administrative.

Would disclosure of the personal affairs information be unreasonable?

44. The concept of ‘unreasonable disclosure’ involves balancing the public interest in the disclosure of official information with the personal interest in privacy in the particular circumstances of a matter.
45. In *Victoria Police v Marke*,⁹ 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’.¹⁰ 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’.¹¹
46. 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 and the circumstances in which it was recorded

The names and other details of Agency officers involved were recorded for the purpose of providing a school service to the Applicant’s[child]. I consider these matters to fall within the

⁷ Sections 33(1) and (2).

⁸ Section 33(9).

⁹ [2008] VSCA 218 at [76].

¹⁰ *Ibid.*

¹¹ *Ibid* at [79].

regular duties of these Agency officers, acknowledging this information was recorded during the COVID pandemic.

It has been said there is nothing particularly sensitive about an Agency officer's personal affairs information in the context of them acting within their duties, however there is information before me to indicate the information of certain third parties is more sensitive in these circumstances.

On the face of the documents, there is also information regarding third parties who are not Agency officers. I consider this information to be sensitive.

I acknowledge certain information in the documents may already be known to the Applicant. Nevertheless, even where a third party's identity may be known to an applicant, disclosure may still be unreasonable in the circumstances.¹²

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

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

There is limited information before me from the Applicant in relation to why they are seeking access to the information claimed to be exempt in the documents, however given the nature of the request I consider they are seeking additional information in relation to the Agency's interactions with themselves and their son.

Where the Applicant already has access to the personal affairs information, I do not consider obtaining this information again through FOI would further assist them in any particular purpose.

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

While I acknowledge the Applicant's has a strong interest in obtaining access to the requested documents, I must also take into account the public interest in protecting the personal privacy of third parties named in the document.

Having considered the content and context of the documents, I am not satisfied any public interest would be promoted by release of the personal affairs information under the FOI Act. I do not consider the release of information that directly identifies Agency staff would provide any additional transparency to their handling of COVID-19 protocols.

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

The nature of disclosure under the FOI Act does not place any restrictions on an applicant's use or further dissemination of a document obtained under FOI.¹⁴

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

On the information before me I consider this to be a relevant factor.

¹² *AB v Department of Education and Early Childhood Development* [2011] VCAT 1263 at [58]; *Akers v Victoria Police* [2003] VCAT 397.

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

¹⁴ *Victoria Police v Marke* [2008] VSCA 218 at [68].

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

In deciding whether disclosure of a document would involve the unreasonable disclosure of a third party's personal affairs information, an agency must notify that person (or their next of kin, if deceased) an FOI request has been received for documents containing their personal information and seek their view as to whether disclosure of the document should occur.¹⁵ 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.¹⁶

The Agency determined it was not practicable to consult with the third parties whose information is contained in the documents. On the information before me, I consider it reasonably likely they would object to the disclosure of their personal affairs information to the Applicant.

(f) Whether disclosure of the information would or would be reasonably likely to endanger the life or physical safety of any person¹⁷

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.¹⁸

Having considered the documents and information received from the Agency, I am satisfied this is a relevant factor to consider in this matter.

(g) Whether the disclosure would increase the risk to a primary person's safety from family violence¹⁹

In determining whether disclosure of information relating to the personal affairs of any person in a document would be unreasonable, section 33(2AB) requires if:

- (a) the request is made to an agency that is an information sharing entity or an authorised Hub entity, or to a Minister for access to an official document of an agency that is an information sharing entity or an authorised Hub entity; and
- (b) the document contains information relating to the personal affairs of the person making the request; and
- (c) the person making the request is a person of concern, or a person who is alleged to pose a risk of committing family violence—

in deciding whether the disclosure would involve the unreasonable disclosure of information relating to the personal affairs of any person, the agency or Minister must also take into account whether the disclosure would increase the risk to a primary person's safety from family violence.

¹⁵ Section 33(2B).

¹⁶ Section 33(2C).

¹⁷ Section 33(2A).

¹⁸ Section 33(2A).

¹⁹ Section 33(2AB).

Accordingly, I must consider whether disclosure of the relevant documents would increase the risk to the safety of a 'primary person'²⁰ from family violence.

I am satisfied the considerations under section 33(2AB) are relevant factors in this matter.

47. In balancing the above factors, I am satisfied it would be unreasonable to release the personal affairs information. As such, this information is exempt from release under section 33(1).
48. The Schedule of Documents in **Annexure 1** sets out my decision on the application of section 33(1) to the documents.

Section 25 – Deletion of exempt or irrelevant information

49. 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.
50. 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 the document meaningless they are not 'practicable' and release of the document is not required under section 25.²²
51. I have considered the effect of deleting irrelevant and exempt information from the documents. In my view, it is practicable for the Agency to delete the irrelevant and exempt information on the basis they have already edited the documents to remove the exempt information.

Conclusion

52. On the information available, I am satisfied the exemptions in sections 33(1) and 30(1) apply to certain information in the documents and I have decided to grant access to the documents in part.
53. As it is practicable to provide the Applicant with an edited copy of the documents with irrelevant and exempt information deleted in accordance with section 25, access is granted in part.

Review rights

54. If the Applicant is not satisfied with my decision, they are entitled to apply to the Victorian Civil and Administrative Tribunal (VCAT) for it to be reviewed.²³
55. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.²⁴
56. 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.

²⁰ Section 33(9) provides 'primary person' has the meaning given in section 144E of the *Family Violence Protection Act 2008* (Vic). Section 144E of the *Family Violence Protection Act 2008* (Vic) provides that 'a person is a *primary person* if an information sharing entity reasonably believes that the person may be subjected to family violence'.

²¹ *Mickelborough v Victoria Police* (General) [2009] VCAT 2786 [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 [26]; *RFJ v Victoria Police FOI Division* (Review and Regulation) [2013] VCAT 1267 at [140], [155].

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

²⁴ Section 52(5).

57. 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

When this decision takes effect

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

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]	[location] Primary school confidential student enrolment form [year]	2	Released in part Section 33(1)	Release in part Sections 33(1), 25	<p>Section 33(1): I am satisfied it would be unreasonable to disclose the personal affairs information in this document for the reasons outlined in the Notice of Decision, above.</p> <p>Section 25: I am satisfied it is practicable to provide the Applicant with an edited copy of this document with exempt and irrelevant information deleted in accordance with section 25.</p>
2.	[date]	[location] Primary school confidential student enrolment form [year]	2	Released in full	Not subject to review	
3.	Undated	Student family occupation index	2	Released in full	Not subject to review	

Document No.	Date of Document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
4.	Undated	Enrolment form – information parents and guardians	2	Released in full	Not subject to review	
5.	[date]	Email	1	Released in full	Not subject to review	
6.	[date]	[type of document]	10	Released in full	Not subject to review	
7.	[date]	[type of document]	2	Released in full	Not subject to review	
8.	[date]	[type of document]	2	Released in full	Not subject to review	
9.	Various	Note	1	Released in part Section 33(1)	Release in part Sections 33(1), 25	<p>Section 33(1): I am not satisfied the ID number contained in this document is personal affairs information however, I consider this information to be irrelevant and can be deleted under section 25.</p> <p>I am satisfied the signature of the Agency officer is personal affairs information and I am satisfied it would be unreasonable to disclose this for the reasons outlined in the Notice of Decision, above.</p>

Document No.	Date of Document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
						Section 25: See comments for Document 1.
10.	[date]	Speaking notes for principal	2	Released in part Section 30(1)	Release in part Section 30(1), 33(1), 25	<p>Section 30(1): I am satisfied certain information in the document is matter in the nature of opinion, advice or recommendation of an Agency officer made in the course of a deliberative process. I am satisfied this information would be contrary to the public interest to release for the reasons outlined in my Notice of Decision above.</p> <p>Section 33(1): I am satisfied the document contains the personal affairs information of several third parties, and disclosure of this information would be unreasonable for the reasons outlined in my Notice of Decision above.</p> <p>Section 25: See comments for Document 1.</p>
11.	Undated	Letter	2	Released in part Section 33(1)	Release in full Section 25	Sections 33(1) and 25: See comments for Document 1.

Document No.	Date of Document [date]	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
12.		News item	1	Released in full	Not subject to review	
13.	[date]	News item	1	Released in part Section 33(1)	Release in part Sections 33(1), 25	Section 33(1) and 25: See comments for Document 1.
14.	[date]	News item	1	Released in full	Not subject to review	
15.	Various	Email with attachment	3	Released in part Section 33(1)	Released in part Section 33(1), 25	Section 33(1) and 25: See comments for Document 1.
16.	Undated	Mathematics note	1	Released in full	Not subject to review	
17.	Undated	Newsletter promo and attachment	1	Released in full	Not subject to review	