

Notice of Decision and Reasons for Decision

Applicant: 'EH1'
Agency: Fire Rescue Victoria
Decision date: 3 February 2022
Exemption and provision considered: Sections 33(1), 25
Citation: 'EH1' and Fire Rescue Victoria (*Freedom of Information*) [2022] VICmr 92 (3 February 2022)

FREEDOM OF INFORMATION – workplace documents – enterprise agreement – wage calculations – salary amounts – specific payment – 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 differs from the Agency's decision.

I have decided to release a small amount of additional information in the document as I am satisfied is not exempt from release under section 33(1).

The Schedule of Documents in **Annexure 1** sets out my decision in relation to the document.

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner

3 February 2022

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency seeking access to certain documents relating to a specific individual and any formula used to calculate payments made by the Agency to that person.
2. Following consultation with the Agency, the Applicant clarified the terms of their request to the following documents:

All documents, emails or correspondence in any form that show the formula used for the calculation of payments, total amounts paid and leave allocation paid to any employee in relation to a claim under [specific Enterprise Agreement clauses].

3. The Agency identified two documents falling within the terms of the request and granted access to one document in full and refused access to certain information in one document under section 33(1). The Agency's decision letter sets out the reasons for its decision.

Review application

4. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
5. Based on the Applicant's request terms, they do not seek access to the names of any individuals in the document, and seek access to the formula used in payment calculations, the total monetary amounts paid and leave allocation paid. Accordingly, the names of third parties listed in the document are irrelevant information for the purposes of section 25, which is discussed below.

Review of exemptions

Section 33(1) – Personal affairs information of third parties

6. A document is exempt from release 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) disclosure would be 'unreasonable'.

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

7. 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 reasonably be determined.²
8. 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
9. 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

¹ Sections 33(1) and 33(2).

² Section 33(9).

³ *O'Sullivan v Department and Heath and Community Services (No 2)* [1995] 9 VAR 1 at [14]; *Beauchamp v Department of Education* [2006] VCAT 1653 at [42].

available and can be used to reidentify a third party from seemingly 'deidentified' information released under the FOI Act.

Specific wage calculation details

10. In *Asher v Department of State & Regional Development*,⁴ 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'. I consider that all individualised monetary values in the document provide details of the quantum of wages received by the named third parties in relation to a specific payment and therefore constitutes the personal affairs information of those third parties.
11. Reidentification of a third party is a relevant factor where an applicant holds or has the capacity to piece together information using other available or accessible information or knowledge about a specific third party in order to identify that individual.
12. Having reviewed the document and the circumstances of this matter, given the specific information in the document used to calculate wages for each Agency officer, I consider the removal of the third parties' names from the document would not necessarily remove the possibility of a third party being identified by the Applicant or other persons given the remaining information in the document.
13. In this case, information in the document relates to a small subset of Agency employees to whom a specific [payment] was paid. I consider the small number of persons to whom this information relates is a factor that increases the likelihood of those individuals being able to be reidentified by a process of matching salary paid with information likely to be held by or available to the Applicant regarding staffing structures and those to whom a payment was paid.

Total expenditure figure

14. However, I consider the total expenditure figure in the final row of the document, which represents the total amount paid, is not capable of identifying or being used to identify a specific individual.
15. As such, I consider this figure does not constitute 'personal affairs information' and is not exempt under 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*,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, is an important right that the FOI properly protects. However, an individual's privacy can be invaded by a lesser or greater degree'.⁷

⁴ [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.

⁵ [2008] VSCA 218 at [76].

⁶ *Ibid.*

⁷ *Ibid* at [79].

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.⁸ 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'.⁹
19. In determining whether disclosure of the specific salary calculation details 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

VCAT has generally accepted there is nothing particularly sensitive about matters occurring or arising out of the course of one's official duties.¹⁰ Subject to an agency demonstrating that special circumstances apply, it is generally not unreasonable to disclose personal affairs information of an agency officer in official documents of an agency where it relates to an employee in their professional capacity.

Information in the document was produced by the Agency following a now settled negotiation process between the Agency and the relevant union. It discloses monetary information in relation to payments made to specific third parties employed by the Agency and is not publicly available.

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 and determining their eligibility for a [specific] payment.

- (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.¹¹

The Applicant did not provide detailed reasons as to their purpose for seeking access to the requested information. However, based on the initial terms of their FOI request, their original purpose appears to be obtaining information about any payments made to a specific Agency officer.

Based on the limited information before me as to the Applicant's purpose, I have not given considerable weight to this factor in favour of disclosure.

⁸ *Coulson v Department of Premier and Cabinet (Review and Regulation)* [2018] VCAT 229.

⁹ [2008] VSCA 218 at [104].

¹⁰ *Re Milthorpe v Mt Alexander Shire Council* (1997) 12 VAR 105.

¹¹ *Victoria Police v Marke* [2008] VSCA 218 at [104].

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

There is public interest in the disclosure of information related to wages of public sector employees for the purposes of transparency, including information about additional wages or payments allocated during an emergent set of circumstances.

I am satisfied information about this payment scheme is already available through internal communications to Agency officers and the parts of the documents already released to the Applicant which show the factors involved in calculating the payment. I consider this information along with the total expenditure figure, which I am satisfied is not exempt from release under section 33(1), satisfies the critical public interest aspects of disclosure.

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 relevant Agency officers.

I have given considerable weight to this factor.

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

The Agency did not consult with the third parties whose information is contained in the document.

Having considered the nature of the personal financial information and the circumstances of this matter, I consider it likely the relevant parties would object to the release of their personal affairs information under the FOI Act.

- (e) The likelihood of further disclosure of the 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 personal affairs information 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 reasonably be likely to endanger the 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.¹² 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.

20. 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.

¹² Section 33(2A).

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’¹³ 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 25.¹⁴
23. I note the Applicant does not seek access the names of third parties contained in the document. Therefore, I consider this information is irrelevant information for the purposes of section 25.
24. I have considered the effect of deleting exempt and irrelevant information from the document. I am satisfied it is practicable to delete this information as to do so would not involve significant effort and would not render the document meaningless in that the Applicant will receive access to some of the requested information.

Conclusion

25. On the information before me, I am satisfied information in the document is exempt from release under section 33(1). However, I am not satisfied the total expenditure figure constitutes personal affairs information, and is not exempt from release under the FOI Act.
26. As I am satisfied it is practicable to provide the Applicant with an edited copy of the document with irrelevant and exempt information deleted in accordance with section 25, access to the document is granted in part.
27. The Schedule of Documents in **Annexure 1** sets out my decision in relation to the document.

Review rights

28. If I determine to disclose a third party’s personal affairs information which an agency determined to be exempt from release under section 33(1), if practicable, I must notify any individual who has a right to apply to VCAT for a review of my decision of their right to do so.¹⁵
29. As I am satisfied the total expenditure figure in the document does not constitute the personal affairs information of a third party, it is not necessary for me to notify any person named in the document regarding my decision.
30. If either the Applicant or the Agency is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.¹⁶
31. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹⁷

¹³ *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].

¹⁴ *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].

¹⁵ Section 49P(5).

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

¹⁷ Section 52(5).

32. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹⁸
33. 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.
34. 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.¹⁹

When this decision takes effect

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

¹⁸ Section 52(9).

¹⁹ 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.	Not dated	Table created by the Agency setting out payments	1	Released in part	<p>Release in part</p> <p>Sections 33(1), 25</p> <p>The document is to be released with information the Agency determined is irrelevant or exempt under section 33(1) and deleted in accordance with section 25, with the exception of the total expenditure figure in the last row.</p>	<p>Section 33(1): I am not satisfied the total expenditure figure constitutes personal affairs information, and is not exempt from release under the FOI Act for the reasons set out in the Notice of Decision above.</p> <p>As detailed in the Notice of Decision above, I am satisfied disclosure of the personal affairs information of third parties in the document would be unreasonable and is exempt from release under section 33(1).</p> <p>Section 25: I am satisfied it is practicable provide the Applicant with an edited copy of the document with irrelevant and exempt information deleted in accordance with section 25, access to the document is granted in part.</p>