

Notice of Decision and Reasons for Decision

Applicant: 'E17'
Agency: Department of Education and Training
Decision date: 18 March 2022
Exemption and provision considered: Sections 33(1), 25
Citation: 'E17' and Department of Education and Training (*Freedom of Information*) [2022] VICmr 107 (18 March 2022)

FREEDOM OF INFORMATION – school records – parent seeking access to information – incident report – passage of time – disclosure of substantive information in document by agency – agency officer names – unreasonable disclosure of personal affairs information of third parties – disclosure contrary to the public interest

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 is the same as the Agency's decision, subject to the release of pronouns which are to be released with the agreement of the Agency.

In relation to the remaining information exempted from release by the Agency, I am satisfied it is exempt under section 33(1).

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

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner
18 March 2022

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency seeking access to an 'incident report dated [date]' which relates to their child who was a student at a primary school in [year].
2. The Agency identified one document falling within the terms of the Applicant's request and refused access to certain information in the document under section 33(1). 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 to the names of Agency officers involved in the incident as recorded in the document.
4. I have examined a copy of the document subject to review. I note the last sentence on page 2 does not contain any Agency officer names and is not subject to my 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

9. During the review, the Agency advised it no longer relies on section 33(1) to exempt from release pronouns in the document. Accordingly, this information can be released to the Applicant and I have considered the application of section 33(1) to other personal affairs information the Agency exempted from release in its decision.

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

10. 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'.

¹ Sections 33(1) and 33(2).

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

11. 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
12. The document contains the names of Agency officers, which is personal affairs information for the purposes of section 33(1).

Would disclosure of the personal affairs information be unreasonable?

13. The concept of 'unreasonable disclosure' involves balancing the public interest in the disclosure of official information with the interest in protecting an individual's personal privacy in the circumstances.
14. 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
15. In determining whether disclosure of the personal affairs information 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

The names of the Agency officers were recorded by an Agency officer in a school incident report as part of their employment duties and statutory responsibilities in recording incidents that occur in schools.

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, and I note the Applicant's submission that this is the case in relation to the document subject to review.

The majority of information in the document was released by the Agency to the Applicant in its decision.

- (b) The Applicant's interest in the information and whether their purpose for seeking the information is likely to be achieved, and whether any public interest would be promoted by the disclosure of 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

In these circumstances and based on the Applicant's submissions, I consider they have a personal interest in seeking access to the names of Agency officers to pursue legal action in

² Section 33(9).

³ [2008] VSCA 218 at [76].

⁴ Ibid.

⁵ Ibid at [79].

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

relation to an incident involving their child. However, there is no information before me (including on the face of the document) to ascertain whether the Applicant's purpose for seeking access to the personal affairs information would likely to be achieved if the document is disclosed in full.

While I accept there is a broader public interest in protecting the wellbeing and safety of young people in the care of the Agency, I consider this must be balanced with the public interest in protecting the personal privacy of third parties named in the document, including Agency officers. In doing so, I acknowledge the Applicant's reference in their submission to the *Charter of Human Rights and Responsibilities Act 2006* (Vic).

In this case, I consider the information already released to the Applicant is substantial and goes to the substance of the incident in question. As such, it is not clear the document needs to be read in conjunction with the names of the Agency officers who met to discuss or were involved in the incident in [year]. Nor do I consider disclosure of this information is necessary to meet any public interest in transparency and accountability as to the conduct of the named Agency officers in these circumstances.

I also note there are avenues for a person to make a complaint about alleged misconduct by a registered teacher, as detailed on the Agency's [website](#). In making a complaint to an external oversight or regulatory body, it is often not necessary to name an individual, but to provide sufficient information as part of the complaint so the body can determine the substance of the complaint and whether it warrants or requires an investigation in accordance with their statutory powers. Such statutory powers often include a power to require the production of documents to the body to assist its investigation.

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

The nature of disclosure under the FOI Act is unconditional and unrestricted, which means an applicant is free to disseminate widely or use a document as they choose once it is released.⁷ As such, the personal affairs information in the document could be distributed widely and I must consider the impact any such disclosure could have on a third party.

Based on the information provided by the Applicant, I consider they primarily seek access to the information for the purpose of taking of legal action and to satisfy their personal interest as a parent. As such, I consider there is a likelihood the personal affairs information in the document would be further disclosed if released under the FOI Act.

(d) 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 that an FOI request has been received for a document containing their personal information and seek their view as to whether disclosure of the document should occur.⁸ However, this obligation does not arise in certain circumstances, including if it is not practicable to do so.⁹

The Agency determined it was not practicable to consult with the relevant third parties. I agree with the Agency's decision and consider it is likely the third parties would be likely object to the release of their names in the document. While this factor is not determinative, noting the

⁷ Ibid at [68].

⁸ Section 33(2B).

⁹ Section 33(2C).

passage of time since the incident occurred and the likely undue stress disclosure may cause the third parties, it has been a relevant consideration in my decision.

- (e) Whether disclosure of the information would or would be reasonably likely to endanger the life or physical safety of any person¹⁰

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.¹¹ Based on the information before me, I do not consider this is a relevant factor in this matter.

Section 25 – Deletion of exempt or irrelevant information

16. 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.
17. Determining what is ‘practicable’ requires consideration of the effort and editing involved in making the deletions ‘from a resources point of view’¹² 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 25.¹³
18. Given the Agency released an edited copy of the document in accordance with its decision, I am satisfied it remains practicable for irrelevant and exempt information to be deleted in accordance with section 25.

Conclusion

19. My decision is the same as the Agency’s decision, subject to the release of pronouns, which are to be released with the agreement of the Agency.
20. In relation to the remaining information exempted from release by the Agency, I am satisfied it is exempt under section 33(1).
21. As it is practicable to provide the Applicant with an edited copy of a document with irrelevant and exempt information deleted in accordance with section 25, access to the document is granted in part.

Review rights

22. 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.¹⁴
23. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹⁵
24. 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.

¹⁰ Section 33(2A).

¹¹ Section 33(2A).

¹² *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].

¹³ *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].

¹⁴ Section 50(1)(b).

¹⁵ Section 52(5).

25. The Agency is required to notify the Information Commissioner in writing as soon as practicable if an application for review of my decision is made to VCAT.¹⁶

¹⁶ Sections 50(3F) and 50(3FA).