

Notice of Decision and Reasons for Decision

Applicant: 'EJ1'
Agency: Department of Families, Fairness and Housing
Decision date: 25 March 2022
Exemption considered: Sections 33(1), 25
Citation: 'EJ1' and Department of Families, Fairness and Housing (Freedom of Information) [2022] VICmr 110 (25 March 2022)

FREEDOM OF INFORMATION – Child Protection records – personal affairs information – release contrary to the public interest – disclosure unreasonable – documents required for court proceedings

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 is the same as the Agency's decision.

I am satisfied the document is exempt from release under section 33(1).

As I am satisfied it is not practicable to provide the Applicant with an edited copy of the document with exempt information deleted in accordance with section 25, access to the document is refused in full.

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner
25 March 2022

Reasons for Decision

Background to review

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

A letter from child protection advising they are no longer involved with [names].
2. The Agency identified one document falling within the terms of the Applicant's request and refused access to the document in full 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.
4. In their review application, the Applicant advised they seek the information for the purposes of confirming the Agency is no longer involved in the care of their child. They also indicated they were willing to accept an edited copy of the document.
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.

Review of exemptions

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'.

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

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

¹ Sections 33(1) and 33(2).

² Section 33(9).

12. 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, the capacity to identify a third party is to be interpreted by reference to the capacity of any member of the public to do so.³
13. The document is a letter from Child Protection in relation to the Applicant and other persons.
14. Having reviewed the document, I am satisfied it contains the personal affairs information of third parties for the purposes of section 33(1).
15. I acknowledge certain parts of the documents would also contain information relating to the Applicant's personal affairs. However, I consider such information would be intertwined with the personal affairs information of third parties.

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 the personal privacy of a third party in the circumstances.
17. In *Victoria Police v Marke*,⁴ 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'.⁵ 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'.⁶
18. In determining whether disclosure of the personal affairs information would be unreasonable in the circumstances, I have considered the following factors in the context of this matter:

(a) The nature of the personal affairs information and the circumstances in which it was obtained

Based on information provided by the Applicant, I acknowledge they likely know the content of the document and the identities of third parties. As such, disclosure of the document would not necessarily reveal new information to them, but serve to provide them with an official record containing the requested information. However, even where an applicant claims to know the identity of a third party, disclosure of their personal affairs information under the FOI Act may still be unreasonable in the circumstances.⁷

The document was produced in the context of the Agency fulfilling its obligations in relation to Child Protection matters, which are sensitive in nature. While I acknowledge the Applicant's connection to the circumstances of the matter, I consider the document itself was created with an intention its content not be shared with the Applicant.

The document contains the name of an Agency employee. While there is nothing particularly sensitive about matters occurring or arising out of the course of an agency officer's professional duties or work responsibilities as a public sector employee,⁸ given the sensitive

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 [2008] VSCA 218 at [76].

⁵ *Ibid.*

⁶ *Ibid* at [79].

⁷ *AB v Department of Education and Early Childhood Development* [2011] VCAT 1263 at [58]; *Akers v Victoria Police* [2003] VCAT 397.

⁸ *Re Milthorpe v Mt Alexander Shire Council* (1997) 12 VAR 105.

nature of the document and its recency, I consider the circumstances of this matter weigh against disclosure of the name of the Agency officer.

(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).⁹

As noted above, the Applicant seeks access to the document to confirm the Agency is no longer involved with the care of their child to assist in legal proceedings. On the information before me, I consider its disclosure may assist the Applicant in fulfilling this purpose.

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

On the information before me, I am not satisfied there is any broader public interest in favour of release.

I acknowledge the Agency's submission that their activities, including those under the FOI Act, are based on the best interests, wellbeing, privacy and safety of the children. I consider these objectives are matters in the public interest and based on the information before me I consider they are relevant to the release of the exempted document. Further, I consider the protection of third parties' privacy who are not children to be a matter of public interest.

While I acknowledge the Applicant's interest in obtaining the document to assist in their court matter, I consider constitutes a personal interest which is overridden by the various public interests that weigh against disclosure.

(d) The likelihood of 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.¹⁰

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.

While there is no information before me to suggest that the personal affairs information would be further distributed, given the sensitive nature of its content, I must consider the impact this could have on the third parties named in the documents.

(e) 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 document should occur.¹¹ However, this obligation does not arise if:

⁹ *Victoria Police v Marke* [2008] VSCA 218 at [104].

¹⁰ *Ibid* at [68].

¹¹ Section 33(2B).

- (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

While there is no information before me to indicate whether the Agency conducted consultation in relation to the disclosure of the personal affairs information, given the context of this matter, I am satisfied it is reasonably like the third parties involved would object to disclosure of their personal affairs information in the document under the FOI Act.

- (f) 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 information before me to suggest that this is a relevant factor in this matter.

- (g) Whether the disclosure would increase the risk to a primary person's safety from family violence¹⁵

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.

Accordingly, I must consider whether disclosure of the relevant documents would increase the risk to the safety of a 'primary person'¹⁶ from family violence.

There is information before me to suggest this is a relevant factor in the matter.

19. Having weighed up the above factors, on balance, I am satisfied the disclosure of the personal affairs information of third parties in the document would be unreasonable in the circumstances.

¹² Section 33(2C).

¹³ Section 33(2A).

¹⁴ Section 33(2A).

¹⁵ Section 33(2AB).

¹⁶ 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'.

20. Accordingly, I am satisfied the document is 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’¹⁷ 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 25.¹⁸
23. The Applicant’s representative advised the Applicant is willing to accept an edited copy of the document.
24. I have considered whether it would be practicable to provide an edited copy of the document with exempt information deleted in accordance with section 25. I am satisfied doing so would not be practicable as the necessary deletion of the personal affairs information in the document would render the document meaningless, particularly given the Applicant’s purpose in seeking access to the document.

Conclusion

25. On the information before me, I am satisfied the document is exempt from release under section 33(1).
26. As I am satisfied it is not practicable to provide the Applicant with an edited copy of the document with exempt information deleted in accordance with section 25, access to the document is refused in full.

Review rights

27. 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.¹⁹
28. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.²⁰
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 the Applicant applies to VCAT for a review of my decision.²¹

¹⁷ *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].

¹⁸ *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].

¹⁹ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

²⁰ Section 52(5).

²¹ Sections 50(3F) and 50(3FA).