

Notice of Decision and Reasons for Decision

Applicant:	'EK8'
Agency:	Major Transport Infrastructure Authority
Decision date:	16 May 2022
Exemption considered:	Section 33(1)
Citation:	'EK8' and Major Transport Infrastructure Authority (<i>Freedom of Information</i>) [2022] VICmr 126 (16 May 2022)

FREEDOM OF INFORMATION – Open Space Advisory Panel – panel members – nominations – key selection criteria questions – selection process – personal affairs information – contrary to the public interest – unreasonable disclosure

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 in that I have decided to release additional information where I am satisfied it is not exempt under section 33(1).

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

A marked-up copy of the document showing the additional information to be released with exempt and irrelevant information delated has been provided to the Agency with this decision.

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner
16 May 2022

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency seeking access to certain documents.
2. Following consultation with the Agency, the Applicant clarified the terms of their request as follows:

The LXP invited members of the public to nominate for the Parkdale Open Space Advisory Panel. Those who were unsuccessful were notified but inadequate information was realised as to the make up of the panel. I therefore requested from the LXP documents relating to the appointment of representatives to the Parkdale Open Space Advisory Panel. I would like to see a list of the community members elected, what their professional, business and political involvements as used in their application are and why they were selected?
3. The Agency identified one document falling within the terms of the Applicant's request and refused access to document in full 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. The Applicant indicated in their FOI request that they seek access to appointed community members and their personal affairs information only. Accordingly, information in the document that relates to unsuccessful candidates is irrelevant and will remain deleted in accordance with section 25.
6. I have examined a copy of the document subject to review.
7. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
8. I have considered all communications and submissions received from the parties.
9. 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.
10. 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) – Personal affairs information

11. 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

¹ Sections 33(1) and 33(2).

(b) such disclosure would be unreasonable.

12. 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

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

13. The document contains the names, email addresses and answers to questions received by the Agency from members of the public in response to an invitation issued by the Agency for individuals to nominate as a member of the Parkdale Open Space Panel.
14. I am satisfied information in the document relates to the personal affairs of third parties and some parts of the document contain information relating to the personal affairs of the Applicant.
15. The document also contains the key selection criteria questions considered by the Agency. I do not consider this information is in the nature of personal affairs information and accordingly, it is not exempt under section 33(1).

Would disclosure of the personal affairs information be unreasonable in the circumstances?

16. In determining whether the exemption applies, it is necessary to determine whether disclosure of the personal affairs information of a third party would be unreasonable in the circumstance. This 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 particular circumstances.
17. The FOI Act does not place any restrictions on an applicant's use or dissemination of documents obtained under FOI.³
18. I also note the decision of *Coulson v Department of Premier and Cabinet*⁴ (**Coulson decision**), in which the Victorian Civil and Administrative Tribunal (**VCAT**) held, the question of whether an agency officer's personal affairs information is exempt under section 33(1) must be considered in the context of the particular circumstances.
19. In this case, I have considered the following factors:

(a) The nature of the personal affairs information

The personal affairs information in the document was received by the Agency in relation to a public advertisement for the appointment of members to the Parkdale Open Space Advisory Panel by way of an application process.

I consider the personal affairs information of panel members named in the document was recorded in the context of seeking appointment as a member of a panel with a public purpose. I also note some of the information in the document is publicly available.

² Section 33(9).

³ *Victoria Police v Marke* [2008] VSCA 218 at [68].

⁴ (Review and Regulation) [2018] VSCA 218 at [68].

(b) The extent to which the information is available to the public

Having considered the nature of the personal affairs information, I do not consider it would be unreasonable to disclose the names of all but one of the appointed candidates in circumstances whereby this information is publicly available. Nor do I consider it would be unreasonable to disclose the key selection criteria questions considered by the Agency as part of the selection process. This information would already be known the Applicant on the basis he was a candidate and others who applied for a position on the advisory panel.

However, there is one name that is not publicly available and I have considered the Agency's written submission regarding this information. Whilst I am unable to disclose the nature of this information, I am satisfied it would be unreasonable to release this individual's name. Accordingly, the name of one of the appointed candidates is exempt under section 33(1) and is to remain deleted.

I have determined the email addresses and the personal statements provided in response to the key selection criteria questions of individual candidates, other than the Applicant's would be unreasonable to release as this information is not publicly available and I consider the email addresses and statements are personal in nature and were provided to the Agency on a confidential basis as part of an application process.

(c) The Applicant's interest in the information

The FOI Act provides a general right of access that can exercised by any person, regardless of their motives 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.⁵

The Applicant indicated that their interest in the document is to better understand the Agency's selection process and the basis for the Agency's decision to elect the successful candidates they appointed.

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

Having reviewed the document, I note the Agency disclosed the appointed panel members names only.

The Applicant did not provide any information to support any public interest that would be promoted by release of the personal affairs information in the document.

In the circumstances, I am not satisfied there is an overriding public interest in the release of the personal affairs information, specifically the email addresses and personal statements made by appointed candidates, that outweighs the personal privacy of those individuals. Rather, I consider the Applicant's interest in the information would serve their personal interest only.

(e) Whether the individuals to whom the information relates consent or object to disclosure

I have reviewed the Agency's submission and note the Agency did not consult with the relevant third parties. While the view of a third party is a relevant consideration, it is not determinative.

⁵ *Victoria Police v Marke* [2008] VSCA 218 at [104].

However, in the context of this matter, I consider it would be reasonably likely the relevant third parties would object to the release of their email addresses and the statements they provided to the Agency as part of an application process.

On balance, I am satisfied the personal statements were provided to the Agency with the expectation of confidentiality. On this basis, I consider the information is personal and sensitive to those individuals in the context of it being released under the FOI Act. As such, I am satisfied disclosure of this information would be reasonably likely to cause the third parties stress and anxiety.

- (f) Whether disclosure of the information would, or would be reasonably likely to, endanger the life or physical safety of any person⁶

I have considered this factor in consideration of whether disclosure of the personal affairs information would be unreasonable.

20. Having weighed up the above factors, on balance, I am satisfied certain information in the document is exempt from release under section 33(1), namely the email addresses of the successful candidates, their personal statements and the name of one of the candidates. However, as outlined above, I have determined to release additional information, being the names of the appointed candidates (exempt one name) and the key selection criteria questions, as I am satisfied this information is not exempt from release.

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’⁷ 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 25.⁸
23. I have considered whether 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. I am satisfied it is practicable to do so as it would not require substantial time and effort, and the edited document would retain meaning.

Conclusion

24. On the information before me, I am satisfied certain information in the document is exempt from release under section 33(1).
25. As I am satisfied it is practicable to provide the Applicant with an edited copy of the document with exempt and irrelevant information deleted in accordance with section 25, access is granted in part.

⁶ Section 33(2A).

⁷ *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].

⁸ *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].

26. A marked-up copy of the document showing the additional information to be released with exempt and irrelevant information deleted has been provided to the Agency with this decision.

Review rights

27. If either party to this review is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.⁹
28. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹⁰
29. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹¹
30. 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.
31. 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.¹²

Third party review rights

32. As I have determined to release documents that contain the personal affairs information of third parties, if practicable, I am required to notify those persons of their right to seek review by VCAT of my decision within 60 days from the date they are given notice.¹³
33. In the circumstances, I have decided notifying the relevant third parties of their review rights is not practicable as the personal affairs information to be released is publicly available.

When this decision takes effect

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

⁹ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

¹⁰ Section 52(5).

¹¹ Section 52(9).

¹² Sections 50(3F) and 5(3FA).

¹³ Sections 49P(5), 50(3) and 52(3).