

Notice of Decision and Reasons for Decision

Applicant: 'ET2'
Agency: Department of Education and Training
Decision date: 25 August 2022
Exemption considered: Section 33(1)
Citation: 'ET2' and Department of Education and Training (Freedom of Information) [2022] VICmr 202 (25 August 2022)

FREEDOM OF INFORMATION – Council project – early childhood – childcare centre – grant – construction project – project costs – disclosure of third party personal affairs information 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 fresh 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.

I am satisfied certain information in the documents is exempt from release under section 33(1).

Given my decision is the same as the Agency's decision and it granted access to the documents in part in accordance with section 25, I consider it remains practicable to provide the Applicant with an edited copy of the documents with exempt information deleted.

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

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner
25 August 2022

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency seeking access to certain documents. The application was subsequently clarified to:

All submitted documents by the [other government agency] to the Department to show compliance with the terms and conditions of the Grant in relation to the \$ 1,600,000 Grant awarded by the Department to [other government agency] during and after completion of the [named Childcare Centre] Construction Project in [location]. This was managed by the then [other government agency].

2. The Agency identified 11 documents, totalling 39 pages, falling within the terms of the Applicant's request and granted access to one document in full, and refused access to eight documents in part and two documents in full under sections 33(1), 32(1) and 34(1)(b). 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. Section 49M(1) permits an agency to make a fresh decision on an FOI request during a review.
5. On 4 July 2022, the Agency made a fresh decision in which it granted access to one document in full and refused access to 10 documents in part under section 33(1).
6. The Applicant did not agree with the Agency's fresh decision and, as required by section 49MA(2), I proceeded with my review on the basis of the fresh decision.
7. I have examined a copy of the documents subject to review.
8. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
9. I have considered all communications and submissions received from the parties.
10. 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.
11. 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 of third parties

12. 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'.

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

13. 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
14. The documents contain the names, signatures, position titles and initials of Agency officers and other third parties.
15. I am satisfied this information constitutes the personal affairs information of third parties for the purpose of 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 personal privacy in the circumstances.
17. 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
18. 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 personal affairs information of the Agency officers recorded in the documents was obtained by the Agency in the context of those individuals performing their official duties associated with the Agency's functions.

Whether the personal affairs information of an Agency officer is exempt under section 33(1) must be considered in the context of each matter.⁶ It has been held there is nothing particularly sensitive about matters occurring or arising in the course of one's official duties and disclosure of this type of information is generally considered not unreasonable.⁷

In this matter, the Agency officers named in the documents are recorded in the context of them carrying out their duties in a professional capacity, in contrast to a personal or private capacity.

The documents also contain the names and contact details of individuals employed at other Victorian Government agencies whose personal affairs information is also recorded in the

² Section 33(9).

³ [2008] VSCA 218 at [76].

⁴ Ibid.

⁵ Ibid at [79].

⁶ *Coulson v Department of Premier and Cabinet (Review and Regulation)* [2008] VCAT 229.

⁷ *Re Milthorpe v Mt Alexander Shire Council* (1997) 12 VAR 105.

context of them carrying out their duties in a professional capacity.

(b) The Applicant's interest in 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).⁸

The Applicant did not provide any reason for seeking access to the personal affairs information in the documents. I note the majority of information in the documents was released to the Applicant by the Agency. In my view, disclosure of the remaining personal affairs information would not assist the Applicant in further understanding the documents.

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

The Applicant did not provide any specific information as to any public interest factors that would be promoted by release of the personal affairs information in the documents.

In the circumstances, I am not satisfied there is an overriding public interest in the disclosure of the personal information that outweighs the personal privacy of the relevant third parties. Nor is there information before me to demonstrate the public interest would be promoted by disclosure of the third party personal affairs information to the Applicant in the circumstances.

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

The FOI Act does not place restrictions on an applicant's use or dissemination of documents obtained under FOI.⁹

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

I am of the view it is reasonably likely the personal privacy of the third parties will be impacted should their personal affairs information be disclosed.

(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 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.¹⁰ However, this obligation does not arise in certain circumstances, including if it is not practicable to do so.¹¹

During the review the Agency advised OVIC it did undertake consultation with two of the third parties only. One third party did not agree to have their personal affairs information released.

While I consider certain third parties may object to the disclosure of their personal affairs information in the circumstances of this matter, the fact a third party may not agree to the

⁸ *Victoria Police v Marke* [2008] VSCA 218 at [104].

⁹ *Ibid* at [68].

¹⁰ Section 33(2B).

¹¹ Section 33(2C).

disclosure of their personal affairs information is a relevant consideration, it is not a determinative factor.¹²

Having considered the Agency's submission, I am satisfied disclosure of the information may cause distress and anxiety to some of the relevant third parties whose personal affairs information appears in the documents.

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

19. In weighing up the above factors, on balance, I am satisfied disclosure of certain personal affairs information would be unreasonable in the circumstances.
20. Accordingly, I am satisfied the personal affairs information in the documents is exempt from release 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'¹⁵ 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 25.¹⁶
23. I am satisfied it is practicable to provide the Applicant with an edited copy of the documents with exempt information deleted in accordance with section 25, so access to the documents is granted in part.

Conclusion

24. On the information before me, I am satisfied certain personal affairs information in the documents is exempt from release under section 33(1).
25. Given my decision is the same as the Agency's decision and it granted access to the document in part in accordance with section 25, I consider it remains practicable to provide the Applicant with an edited copy of the document with exempt information deleted.
26. The Schedule of Documents in **Annexure 1** sets out my decision in relation to each document.

¹² *Marke v Victoria Police* (2007) 28 VAR 84; [2007] VSC 522 at [45], *Marke v Victoria Police* [2007] VCAT 747 at [22].

¹³ Section 33(2A).

¹⁴ Section 33(2A).

¹⁵ *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].

¹⁶ *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].

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.¹⁷
28. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹⁸
29. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹⁹
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.²⁰

¹⁷ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

¹⁸ Section 52(5).

¹⁹ Section 52(9).

²⁰ Sections 50(3F) and 50(3FA).

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
1.	[date]	Certificate of Expenditure Acquittal Form – Children’s Facilities Capital Program MAJOR GRANTS	2	Released in part Section 33(1)	Release in part Sections 33(1), 25 The document is to be released except for the information exempted from release by the Agency.	Section 33(1): I am satisfied it would be unreasonable to disclose certain personal affairs information in this document for the reasons outlined in the Notice of Decision, above. Section 25: I am satisfied it is practicable to provide the Applicant with an edited copy of this document with exempt information deleted in accordance with section 25.
2.	[date]	Certificate of final inspection	2	Released in part Section 33(1)	Release in part Sections 33(1), 25 The document is to be released except for the information exempted from release by the Agency.	Section 33(1): See comments in Document 1. Section 25: See comments in Document 1.
3.	[date]	[other government agency] – Progress expenditure report	7	Released in part Section 33(1)	Release in part Sections 33(1), 25 The document is to be released except for the information exempted from release by the Agency.	Section 33(1): See comments in Document 1. Section 25: See comments in Document 1.
4.	[date]	Letter to [other government agency]	1	Released in part Section 33(1)	Release in part Sections 33(1), 25	Section 33(1): See comments in Document 1.

Document No.	Date of Document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
					The document is to be released except for the information exempted from release by the Agency.	Section 25: See comments in Document 1.
5.	[date]	Common Funding Agreement	12	Released in part Section 33(1)	Release in part Sections 33(1), 25 The document is to be released except for the information exempted from release by the Agency.	Section 33(1): See comments in Document 1. Section 25: See comments in Document 1.
6.	[date]	Occupancy Permit	4	Released in part Section 33(1)	Release in part Sections 33(1), 25 The document is to be released except for the information exempted from release by the Agency.	Section 33(1): See comments in Document 1. Section 25: See comments in Document 1.
7.	[date]	Service Approval Letter	2	Released in part Section 33(1)	Release in part Sections 33(1), 25 The document is to be released except for the information exempted from release by the Agency.	Section 33(1): See comments in Document 1. Section 25: See comments in Document 1.
8.	[date]	Site Meetings Minutes	3	Released in part	Release in part	Section 33(1): See comments in Document 1.

Document No.	Date of Document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
				Section 33(1)	Sections 33(1), 25 The document is to be released except for the information exempted from release by the Agency.	
9.	[date]	Site Meeting Minutes	3	Released in part Section 33(1)	Release in part Sections 33(1), 25 The document is to be released except for the information exempted from release by the Agency.	Section 33(1): See comments in Document 1.
10.	[date]	Tender Acceptance Letter	2	Released in part Section 33(1)	Release in part Sections 33(1), 25 The document is to be released except for the information exempted from release by the Agency.	Section 33(1): See comments in Document 1. Section 25: See comments in Document 1.
11.	N/A	Tender Program	1	Released in full	Not subject to review	