

Notice of Decision and Reasons for Decision

Applicant: 'EW5'
Agency: Department of Jobs, Precincts and Regions
Decision date: 27 October 2022
Exemption considered: Section 33(1)
Citation: 'EW5' and Department of Jobs, Precincts and Regions (Freedom of Information) [2022] VICmr 233 (27 October 2022)

FREEDOM OF INFORMATION – animal welfare – animal cruelty allegations – commercially farmed animals – investigation of complaint – handwritten notes – photographs of commercial farm and animals – personal affairs information – *Prevention of Cruelty to Animals Act 1986* (Vic)

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 documents requested by the Applicants under the FOI Act.

My decision on the Applicants' request is the same as the Agency's decision in that I am satisfied the documents are exempt from release under section 33(1).

As it is not practicable to delete exempt information from the documents, access is refused in full.

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

27 October 2022

Reasons for Decision

Background to review

1. The Applicants' request follows a published media article regarding a farm under investigation for allegations of animal cruelty.
2. The Applicants made a request to the Agency seeking access to the following documents:

...for the period covering [date] to [date] inclusive, we request a copy of documents relating to all inspections of the Farm including reports, field notes, witness and owner operator statements, photographs and video taken inside the [type] housing sheds (rearing facilities for livestock intended for human consumption and hence of public interest), assessments of the living conditions of the [type of animal] against the Model Code of Practice for [name of Code of Practice], and all records that describe the actions taken subsequent to the inspections including but not limited to number of [events] with welfare reasons for such. **(Part 1)**

Also in relation to the same [type of complaint], and the update of [date] to the article in [name of publication] by [named person] with title [name of article], where the Editor says [quote from article], we request a copy of all documents that enabled and prove the aforementioned [description of quote], including but not limited to:

 1. Statements to the media;
 2. Written records of telephone calls to the media;
 3. Application of the relevant section(s) of the Prevention of Cruelty to Animals Act (POCTA) including penalties, restrictions, and order(s) of any type placed on the owner-operator; and
 4. Statement by authority of the delegated member of Animal Welfare Victoria to close the complaint as part of administration of POCTA 1986. **(Part 2)**
3. The Agency identified six documents falling within the terms of the Applicants' request and refused access to the documents in full, relying on the exemption under section 33(1). The Agency advised it was unable to locate documents in relation to part 2 of the request.

Complaint concerning adequacy of document searches

4. During the review, the Applicants raised concerns about the adequacy of the Agency's document searches in relation to their FOI request. The Applicants considered further documents should be in the Agency's possession that contain an assessment of whether the [relevant Code of Practice] or other relevant legislation was breached and correspondence sent to a Minister.
5. In accordance with section 61B(3), these concerns were addressed as part of this review.
6. OVIC staff made enquires with the Agency to address the Applicant's concerns.
7. Having reviewed the Agency's submissions in response to OVIC's enquiries, there is no information before me to suggest the Agency's interpretation of the scope of the Applicant's request was narrow or that its document searches were conducted in a manner that would limit the discovery of relevant documents.
8. Accordingly, I consider the Applicants' complaint has been fully pursued and there is no basis for the making of further inquiries or the taking of further action under the FOI Act.

Review application

9. The Applicants sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.

10. The Applicants indicated they do not seek access to personal affairs information. However, personal affairs information is interpreted broadly under the FOI Act, so I have considered whether section 33(1) applies to the documents.
11. I have examined a copy of the documents subject to review.
12. The Applicants and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
13. I have considered all communications and submissions received from the parties.
14. 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.
15. 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

16. 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 an applicant (a **third party**);¹ and
 - (a) such disclosure would be 'unreasonable'.

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

17. 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
18. A document will disclose a third party's personal affairs information if it is capable, either directly or indirectly, of identifying that person.
19. The documents are handwritten field notes taken by an Agency officer of observations of and discussions with third parties regarding their farm, as well as photographs taken by the Agency officer of the farm.
20. While the documents relate to the third parties' business, given it relates to [description of] business, I am satisfied it also discloses the personal affairs information of those third parties. Further, as the identity of at least one of the individuals is known, I consider all of the documents, including those not directly identifying a third party, constitute personal affairs information.

Would disclosure of the personal affairs information be unreasonable?

¹ Sections 33(1) and 33(2).

² Section 33(9).

21. 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 particular circumstances.
22. 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
23. In determining whether disclosure of the personal affairs information 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 it was obtained

The documents are notes and photographs taken by Agency officers during an inspection of a farm, or immediately after, in response to a complaint. The complaint was unsubstantiated.

The third parties' personal affairs information was obtained in the course of the Agency carrying out its regulatory functions under the *Prevention of Cruelty to Animals Act 1986* (Vic), namely responding to a complaint about alleged animal cruelty.

I consider the documents are sensitive as they relate to the investigation of an alleged complaint of animal cruelty that was not substantiated and relates to matters that are often the subject of impassioned debate.

(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).⁶

The Applicants' request follows [circumstances of the request].

The Applicants seek access to the documents to determine whether they consider the Agency met its obligations in responding to the complaint. I consider disclosure would demonstrate the actions taken by the Agency in response to the complaint.

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

I consider there is a public interest in disclosure of information that demonstrates the Agency met its legislative obligations in responding to allegations of animal cruelty. However, I also consider there is public interest in the Agency maintaining the privacy of individuals where complaints have not been substantiated and where the community would expect the public sector to protect personal affairs information. This ensures the Agency's ability to obtain the cooperation of the public and similar information in order to effectively and efficiently carry out its investigative functions. Therefore, I consider there is a greater public interest in the third parties' information not being released to the Applicant.

³ [2008] VSCA 218 at [76].

⁴ Ibid.

⁵ Ibid at [79].

⁶ Ibid at [104].

(d) The likelihood of disclosure of information, if released under FOI

The FOI Act does not place any restrictions on an applicant's use or dissemination of documents obtained under FOI. Therefore, disclosure of an individual's identity may be unreasonable where there are concerns about the way in which the information will be used by an applicant if disclosed under the FOI Act.⁷

I do not know whether the Applicants seek to further disseminate the information in the documents. However, I consider that if it were to be disseminated, the impact on the third parties would likely be significant and may lead to further scrutiny.

(e) Whether the third party 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.⁸ However, this obligation does not arise in certain circumstances, including where it is not practicable to do so.⁹

The Agency did not to consult with the third parties to seek their views on disclosure of their personal affairs information in the document.

Given the sensitive circumstances of this matter, I consider the third parties would be reasonably likely to object to disclosure of their personal affairs information.

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

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.¹⁰ However, I do not consider this to be a relevant factor in this matter.

24. Having considered the content and context of the personal affairs information exempted from release by the Agency under section 33(1), I am satisfied its disclosure would be unreasonable in the circumstances of this matter.
25. Accordingly, I am satisfied the third party's personal affairs information, to which the Agency refused access under section 33(1), is exempt from release.

Section 25 – Deletion of exempt or irrelevant information

26. 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.
27. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'¹¹ and the effectiveness of the deletions. Where

⁷ *AOZ v JLV (Review and Regulation)* [2019] VCAT 31 at [102].

⁸ Section 33(2B).

⁹ Section 33(2C).

¹⁰ Section 33(2A).

¹¹ *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].

deletions would render a document meaningless, they are not 'practicable' and release of the document is not required under section 25.¹²

28. I have considered the effect of deleting exempt information from the documents. In my view, it is not practicable to delete the exempt information as to do so would render the documents meaningless.

Conclusion

29. On the information before me, I am satisfied the documents are exempt from release under section 33(1).
30. As I am satisfied it is not practicable to provide the Applicants with an edited copy of the documents with exempt information deleted in accordance with section 25, access is refused in full.
31. The Schedule of Documents in **Annexure 1** sets out my decision in relation to each document.

Review rights

32. If either party to this review is not satisfied with my decision, they are entitled to apply to the Victorian Civil and Administrative Tribunal (**VCAT**) for it to be reviewed.¹³
33. The Applicants may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹⁴
34. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹⁵
35. 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.
36. 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.¹⁶

When this decision takes effect

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

¹² *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].

¹³ The Applicants in section 50(1)(b) and the Agency in section 50(3D).

¹⁴ Section 52(5).

¹⁵ Section 52(9).

¹⁶ 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
1.	[date]	Field notes 1	3	Refused in full Section 33(1)	Refuse in full Section 33(1) The document is exempt in full under section 33(1) for the reasons described above in the Notice of Decision.
2.	[date]	Supplementary Notes	2	Refused in full Section 33(1)	Refuse in full Section 33(1) The document is exempt in full under section 33(1) for the reasons described above in the Notice of Decision.
3.	[date]	Field notes 1	3	Refused in full Section 33(1)	Refuse in full Section 33(1) The document is exempt in full under section 33(1) for the reasons described above in the Notice of Decision.
4.	[date]	Field Notes 2	2	Refused in full Section 33(1)	Refuse in full Section 33(1) The document is exempt in full under section 33(1) for the reasons described above in the Notice of Decision.
5.	[date]	Field notes 2 – [reference]	1	Refused in full Section 33(1)	Refuse in full Section 33(1)

Document No.	Date of Document	Document Description	No. of pages	Agency Decision	OVIC Decision
					The document is exempt in full under section 33(1) for the reasons described above in the Notice of Decision.
6.	Undated	Photographs	22	Refused in full Section 33(1)	Refuse in full Section 33(1) The document is exempt in full under section 33(1) for the reasons described above in the Notice of Decision.