

## Notice of Decision and Reasons for Decision

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Applicant:	'EY5'
Agency:	Department of Education and Training
Decision date:	22 December 2022
Exemption and provision considered:	Sections 33(1), 25
Citation:	'EY5' and Department of Education and Training (Freedom of Information) [2022] VICmr 251 (22 December 2022)

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FREEDOM OF INFORMATION – school incident – video footage – video recording – personal affairs information – personal affairs of students – editing of video footage – unreasonable to disclose certain information – practicable to edit

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.

While I am satisfied personal affairs information of some third parties is exempt from release under section 33(1), I am not satisfied the personal affairs information of all third parties to which the Agency refused access under section 33(1) is exempt from release.

As I am satisfied it is practicable to provide the Applicant with an edited copy of Document 2 with exempt information removed in accordance with section 25, access to the document is granted in part.

The Schedule of Documents in **Annexure 1** sets out my decision in relation to Document 2.

My reasons for decision follow.

**Joanne Kummrow**  
Public Access Deputy Commissioner

22 December 2022

## Reasons for Decision

### Background to review

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

I have been provided this email address by [Applicant's child's school] to request access for information to assist my child [Applicant's child name], that was video recorded being bullied at [Applicant's child's school] on [date] during school hours. In particular, I am after the video recording and copy of [my child's] statement of the event please.

[Further details redacted]

2. The Agency identified two documents falling within the terms of the Applicant's request and granted access to Document 1 in full and denied access to Document 2 in full under section 33(1). The Agency's decision letter sets out the reasons for its decision.
3. I note the Applicant's FOI request states that documents may be edited 'due to other's privacy', however the Agency did not address this in its decision and during the review the Applicant advised they seek access to the personal affairs information of third parties.

### 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 they sought access only to the third parties' voices in the document. Accordingly, this review relates to the document to which the Agency refused access in full.
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) – Documents affecting the personal privacy of a third party***

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**);<sup>1</sup> and
  - (b) such disclosure would be ‘unreasonable’.

*Does the document contain a third party’s personal affairs information?*

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 this may be reasonably determined.<sup>2</sup>
13. 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 nature of disclosure under the FOI Act is unrestricted and unconditional, this is to be interpreted by reference to the capacity of any member of the public to identify a third party.<sup>3</sup>
14. Document 2 comprises a [length] video that captures images and the voice of [a number of individuals].
15. During the review, the Agency advised it could edit the footage to remove the personal affairs information of third parties, and maintained its decision that the remaining information is exempt from release under section 33(1).
16. OVIC asked the Applicant whether they were agreeable to receiving an edited copy of the footage with third party personal affairs information deleted. The Applicant advised they do not agree, and that they are seeking access to personal affairs information of persons other than their child.
17. Therefore my review is limited to whether the following information is exempt under section 33(1): [details of information subject to review].
18. I am satisfied the above information amounts to personal affairs information.

*Would disclosure of the personal affairs information be unreasonable?*

19. 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.
20. In *Victoria Police v Marke*,<sup>4</sup> 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’.<sup>5</sup> The Court further held, ‘[t]he protection of privacy, which lies at the heart of

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<sup>1</sup> Sections 33(1) and 33(2).

<sup>2</sup> Section 33(9).

<sup>3</sup> *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].

<sup>4</sup> [2008] VSCA 218 at [76].

<sup>5</sup> *Ibid.*

[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'.<sup>6</sup>

21. 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

The footage captures an incident that occurred in school grounds, [details]. As described above, it captures personal affairs of individuals other than the Applicant's child.

Given the personal affairs information relates to children, I consider the information is sensitive and this factor weighs against disclosure.

While I acknowledge the Applicant's submission on this matter, I must balance the right of a person to access a document under the FOI Act with the right of another person to maintain their personal privacy.

(b) The circumstances in which the Agency obtained the information

The footage was taken by a third party.

I accept the Applicant may know the identity of third parties who are captured in the footage, as detailed in their submission. Nevertheless, even where an applicant claims to know the identity of a third party, disclosure of the third party's personal affairs information under the FOI Act may still be unreasonable in the circumstances.<sup>7</sup>

(c) 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).<sup>8</sup>

The Applicant states they seek access to the document for the purpose of understanding what happened during the incident captured on video and [further details].

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

As stated above, [details of the reasons for the request]. Therefore, I consider the Applicant's interest is of a private nature.

Further, I consider the public interest in this matter weighs significantly in favour of maintaining the privacy of the children concerned. In my view disclosure of this information would significantly affect those individuals, and may mean that students no longer trust the school with information they would otherwise provide. This in turn could have a significant impact on the welfare of students at the school.

(e) The likelihood of disclosure of information, if released

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<sup>6</sup> Ibid at [79].

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

<sup>8</sup> *Victoria Police v Marke* [2008] VSCA 218 at [104].

As the FOI Act does not place any restrictions on an applicant's use or dissemination of a document obtained under FOI, this is to be interpreted by reference to the capacity of any member of the public to identify a third party.<sup>9</sup>

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.

As above, [details of reasons for the request]. This factor therefore not weighs in favour of disclosure.

(f) Whether the individuals to whom the information relates object, or would be likely to object, to the release of the information

In deciding whether granting access to 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.<sup>10</sup> However, this obligation does not arise in certain circumstances, including where

- (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; or
- (b) it is not practicable to do so.<sup>11</sup>

I do not have specific information before me as to the views of third parties', as the Agency determined third party consultation would not be practicable.

I am of the view the third parties, and/or their parents or legal guardians, would be reasonably likely to object to the release of their personal affairs information under the FOI Act given the information relates to children.

(g) 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.<sup>12</sup>

There is no information before me to suggest this is a relevant factor in this case.

22. Having weighed up the above factors, I am satisfied disclosure of the third parties' personal affairs information in the document would be unreasonable, and this information is therefore exempt under section 33(1).

23. The Schedule of Documents in **Annexure 1** outlines my decision in relation to section 33(1).

### ***Section 25 – Deletion of exempt or irrelevant information***

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<sup>9</sup> Ibid at [68].

<sup>10</sup> Section 33(2B).

<sup>11</sup> Section 33(2C).

<sup>12</sup> Section 33(2A).

24. 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.
25. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'<sup>13</sup> 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.<sup>14</sup>
26. The Agency advises that it is practicable to edit the video footage to remove exempt information.
27. While I note the Applicant advised that they seek a full copy of the footage and do not agree to it being edited, given the Agency is willing to edit the footage, I consider a decision granting access in part to the footage will be of more assistance to the Applicant than a decision in which section 25 is not engaged and the document is determined to be exempt from release in full.

### **Conclusion**

28. On the information before me, I am satisfied the following information in Document 2 is exempt from release under section 33(1):
  - (a) [details of exempt information]
29. As I am satisfied it is practicable to edit the exempt information from the footage in accordance with section 25, access to Document 2 is granted in part.
30. The Schedule of Documents in **Annexure 1** sets out my decision in relation to Document 2.

### **Review rights**

31. 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.<sup>15</sup>
32. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.<sup>16</sup>
33. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.<sup>17</sup>
34. Information about how to apply to VCAT is available online at [www.vcat.vic.gov.au](http://www.vcat.vic.gov.au). Alternatively, VCAT may be contacted by email at [admin@vcat.vic.gov.au](mailto:admin@vcat.vic.gov.au) or by telephone on 1300 018 228.
35. 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.<sup>18</sup>

### **When this decision takes effect**

35. My decision does not take effect until the Agency's 14 day review period expires.

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<sup>13</sup> *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].

<sup>14</sup> *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].

<sup>15</sup> The Applicant in section 50(1)(b) and the Agency in section 50(3D).

<sup>16</sup> Section 52(5).

<sup>17</sup> Section 52(9).

<sup>18</sup> Sections 50(3F) and 50(3FA).

36. If a review application is made to VCAT, my decision will be subject to any VCAT determination.

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
1.	[Date]	[Secondary College] – Student Statement – [Student name]	1	Release in full	Not subject to review	
2.	[Undated]	Video file	NA	Released in part  Section 33(1)	Release in part  Sections 33(1), 25  The document is to be released except for the following information which is exempt from release under section 33(1) and is to be deleted in accordance with section 25:  • [details of third party information in the document]	During the review the Agency determined it no longer seeks to rely on section 33(1) to exempt from release certain personal affairs information relating to the Applicant’s child. Therefore, this information is not subject to review and is to be released to the Applicant.  <b>Section 33(1):</b> I am satisfied disclosure of certain personal affairs information in the document would be unreasonable for the reasons set out in the Notice of Decision above.  <b>Section 25:</b> I am satisfied it is practicable to provide the Applicant with an edited copy of the footage with exempt information removed in accordance with section 25.