

## Notice of Decision and Reasons for Decision

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Applicant: 'DL4'  
Agency: RSPCA  
Decision date: 6 August 2021  
Exemptions considered: Sections 33(1), 35(1)(b)  
Citation: 'DL4' and RSPCA (Victoria) (Freedom of Information) [2021] VICmr 230 (2 July 2021)

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FREEDOM OF INFORMATION – complaint – alleged animal cruelty – complaint summary – information that would identify complainant – information obtained from complainant

All reference to legislation in this document is to the *Freedom of Information Act 1982* (Vic) (**FOI Act**) unless otherwise stated.

### Notice of Decision

I conducted a review under section 49F of the Agency's decision to refuse access to documents requested by the Applicant under the FOI Act.

I am satisfied the documents are exempt from release under sections 33(1) and 35(1)(b).

Access to Document 1 is granted in part in accordance with section 25, and access to Documents 2 to 6 are refused in full.

Accordingly, my decision in relation to the Applicant's FOI request is the same as the Agency's decision.

My reasons for decision follow.

**Joanne Kummrow**  
Public Access Deputy Commissioner

6 August 2021

## Reasons for Decision

### Background to review

1. The Applicant made a request to the Agency seeking access to the following documents:
  - Information that was reported on [address in metropolitan Melbourne]
  - Details of the person or persons [who made the complaint]
  - Also a copy of their complaint.
2. The Agency identified six documents falling within the terms of the Applicant's request and granted access to one document in part and refused access to five documents in full. The Agency relied on the exemptions under sections 33(1) and 35(1)(b) to refuse access to information in the documents. The Agency's decision letter sets out the reasons for its decision.

### Review

3. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access to exempt information in the documents.
4. I have examined copies of the documents subject to review.
5. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
6. I have considered all relevant communications and submissions received from the parties.
7. 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.
8. I note Parliament's intention the FOI Act must be interpreted so as to further the object of the Act and that 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.

### ***Section 33(1) – Documents affecting personal privacy***

9. 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'.

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

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

10. Information relating to an individual's 'personal affairs' includes, but is not limited to, information that identifies any person, or discloses their address or location. It also includes any information from which such information may be reasonably determined.<sup>2</sup>
11. A third party's opinion or observations about another person's conduct can constitute information in relation to the personal affairs of a third party.<sup>3</sup>
12. A document will disclose personal affairs information if it is capable of, either directly or indirectly, identifying a particular individual whose personal affairs are disclosed. As the nature of disclosure under the FOI Act is unrestricted and unconditional, this is to be interpreted by the capacity of any member of the public to potentially identify a third party.<sup>4</sup>
13. I am satisfied Document 1 contains the personal affairs information of third parties, namely, the surname of a third party contractor who recorded the complaint and the name, address, email address, telephone number and other identifying information of a third party who made a complaint to the Agency (**complainant**).

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

14. The concept of 'unreasonable disclosure' involves balancing the public interest in disclosure of official information with the protection of a person's right to privacy in the circumstances.
15. The Supreme Court of Victoria Court of Appeal has held there is 'no absolute bar to providing access to documents which relate to the personal affairs of others', and 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>
16. In determining whether disclosure of the personal affairs information of third parties in the documents would be unreasonable in this matter, I have considered the following factors:
  - (a) The nature of the personal affairs information and the circumstances in which the information was obtained

Where a member of the public provides an agency with information about a matter for which the agency is responsible for investigating and regulating, it is often the very nature of providing information or making a complaint to the agency about an individual or organisation will be sensitive in nature.

In the context of this matter, the complaint concerns alleged animal cruelty. As such, I consider the nature of the personal affairs information in the documents is sensitive given this context.

I also consider the information was provided to the Agency by the complainant with an expectation of confidentiality in that the complainant's name, contact details and identifying information would not be provided to the Applicant.

In terms of the personal affairs information of the third party contractor in Document 1, I consider this information appears in the context of their professional role as a public sector employee, rather than in their personal or private capacity. Generally, it will only be

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

<sup>3</sup> *Richardson v Business Licensing Authority* [2003] VCAT 1053, cited in *Davis v Victoria Police (General)* [2008] VCAT 1343 at [43], *Pritchard v Victoria Police (General)* [2008] VCAT 913 at [24], *Mrs R v Ballarat Health Services (General)* [2007] VCAT 2397 at [13].

<sup>4</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>5</sup> *Victoria Police v Marke* [2008] VSCA 218 at [76].

where special circumstances exist that disclosure of such information will be unreasonable for the purposes of section 33(1).

(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 in the circumstances.<sup>6</sup>

In their submission, the Applicant states they seek access to the exempted information as they consider 'the information provided to the (Agency) was false and misleading and detrimental to the [Agency]'.

I acknowledge the document contains the information sought by the Applicant and would allow them to identify and locate the complainant. However, this is one factor and must be weighed against other relevant factors in determining whether disclosure would be unreasonable in the circumstances.

I am of the view disclosure of the personal affairs information of a third party contractor, whose information appears in Document 1, would not assist the Applicant in understanding the nature of the complaint, the identity of the complainant or the Agency's response.

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

The Applicant further submitted the information would be 'detrimental to the (Agency)' but did not provide information as to any public interest that would be promoted by release of the personal affairs information in Document 1.

In the circumstances, I do not consider there is a broader public interest that would be served by the disclosure of the personal affairs information in Document 1. Rather, I consider the Applicant's interest in the personal affairs information would serve a personal interest only.

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

The Agency determined it is not practicable to consult with the complainant on grounds it may cause them undue stress. I accept consultation in these circumstances is not practicable.

In any case, I am satisfied it is reasonably likely the complainant would object to the disclosure of their personal affairs information in the documents, having considered the context in which this information was obtained by the Agency.

I have considered the views of other third parties, who were consulted as to the release of their personal affairs information in the documents. I note the Agency released the personal affairs information of third parties who agreed to its disclosure.

While the view of a third party as to disclosure of their personal affairs information under the FOI Act is a relevant factor, is not determinative. I am of the view it will generally be

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<sup>6</sup> *Victoria Police v Marke* [2008] VSCA 218 at [104].

where special circumstances apply only, that the disclosure of an agency officer's name will be unreasonable.

Having reviewed the terms of the Applicant's request, their stated purpose for seeking access to the personal affairs information exempted from release by the Agency (which is primarily focused on the identity of the complainant) and the views of the third parties, I accept disclosure of their names would likely cause them unnecessary stress.

- (e) Whether disclosure of the information would, or would be reasonably likely to endanger the life or physical safety of any person<sup>7</sup>

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

17. Having weighed up the above factors, on balance, I am satisfied disclosure of the personal affairs information of third parties in Document 1 would be unreasonable in the circumstances.
18. Accordingly, I am satisfied the relevant information in the documents is exempt under section 33(1).

***Section 35(1)(b) – information communicated in confidence***

19. A document is exempt under section 35(1)(b) if two conditions are satisfied:
- (a) disclosure would divulge information or matters communicated in confidence by or on behalf of a person or a government to an agency or Minister; and
  - (b) disclosure would be contrary to the public interest as it would reasonably likely impair the ability of an agency or a Minister to obtain similar information in the future.

*Would disclosure divulge information or matter communicated in confidence by or on behalf of a person or a government to an agency?*

20. Whether information communicated by an individual was communicated in confidence is a question of fact.<sup>8</sup> When determining whether information provided to an agency was communicated in confidence, it is necessary to consider the position from the perspective of the communicator.<sup>9</sup>
21. The documents contain information relating to a complaint made against the Applicant, including details of the complaint and supporting information provided by the complainant in relation to the complaint. I am satisfied from the context of the information and the submission of the Agency that the complaint and supporting information was communicated by the complainant in confidence.

*Would disclosure be contrary to the public interest as it would be reasonably likely to impair the ability of an agency to obtain similar information in the future?*

22. In deciding whether disclosure would be contrary to the public interest, I must consider whether disclosure of the documents would be reasonably likely to impair the ability of the Agency to obtain similar information in the future.
23. In *Gunawan v Department of Education*,<sup>10</sup> the Victorian Civil and Administrative Tribunal (VCAT) discussed the importance of confidentiality in the course of an investigation:

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<sup>7</sup> Section 33(2A).

<sup>8</sup> *Ryder v Booth* [1985] VR 869 at 883; *XYZ v Victoria Police* [2010] VCAT 255 at [264].

<sup>9</sup> *Ryder v Booth* [1985] VR 869 at 883; *XYZ v Victoria Police* [2010] VCAT 255 at [265].

<sup>10</sup> [1999] VCAT 665.

...I consider that disclosure of the information contained in those documents would be contrary to the public interest, because I accept the evidence that the unit ... would be substantially impaired in their ability to undertake investigations in the future, and ... would be severely compromised by any interference in the confidentiality of the process...

24. The Applicant seeks access to certain information in the documents as they consider the complaint made against them is false and misleading.
25. The Agency has statutory power to investigate and prosecute matters involving alleged animal cruelty in accordance with its functions under the *Prevention of Cruelty to Animals Act 1986* (Vic) (**POCTA Act**).
26. I acknowledge the Applicant's personal interest in seeking access to information regarding the complainant where they consider the complaint made against them is false and misleading. However, the exemption under section 35(1)(b) is not concerned as to whether a complaint or information provided to an agency is true or not.
27. Where a complainant relies on the confidentiality of their identity being maintained in providing information or making a complaint to an agency about a third party, I consider disclosure of any information that would reasonably disclose the complainant's name, identity or location would have a substantial impact upon the willingness of members of the public to come forward with similar information or complaints in the future. Such an outcome would be detrimental to the Agency and compromise its ability to carry out and enforce its important functions under the POCTA Act.
28. I am satisfied information in the document that was provided in confidence to the Agency would disclose the complainant's identity and location. Further, I am satisfied the disclosure of such information would be reasonably likely to impair the Agency's ability to obtain similar information in the future in the context of carrying out its functions under the POCTA Act.
29. Accordingly, I am satisfied the relevant information in the documents is exempt under section 35(1)(b).

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

30. 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.
31. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'<sup>11</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>12</sup>
32. I have considered the effect of deleting the exempt information in the documents in accordance with section 25. I note the Agency provided the Applicant with an edited copy of Document 1 with exempt information deleted in accordance with section 25. However, I am satisfied it is not practicable to delete the exempt information in Documents 2 to 6, as to do so would render these documents meaningless.

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<sup>11</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>12</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].

## **Conclusion**

33. On the information before me, I am satisfied the documents are exempt from release under sections 33(1) and 35(1)(b).
34. Access to Document 1 is granted in part in accordance with section 25, and access to Documents 2 to 6 is refused in full.
35. Accordingly, my decision in relation to the Applicant's FOI request is the same as the Agency's decision.

## **Review rights**

36. If either party to this review is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.<sup>13</sup>
37. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.<sup>14</sup>
38. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.<sup>15</sup>
39. 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.
40. 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>16</sup>

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

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

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<sup>13</sup> The Applicant in section 50(1)(b) and the Agency in section 50(3D).

<sup>14</sup> Section 52(5).

<sup>15</sup> Section 52(9).

<sup>16</sup> Sections 50(3F) and (3FA).