

## Notice of Decision and Reasons for Decision

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Applicant:	'FB5'
Agency:	Department of Education
Decision date:	5 April 2023
Exemption and provision considered:	Sections 33(1), 25
Citation:	'FB5' and Department of Education (Freedom of Information) [2023] VICmr 22 (5 April 2023)

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FREEDOM OF INFORMATION – school records – allegations of historic sexual abuse – school photographs – misconduct reports – allegations involving staff members – personal affairs information – documents affecting personal privacy of third parties

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 certain documents requested by the Applicant under the FOI Act.

Following the issuing of its fresh decision, the Agency released additional documents to the Applicant, being Documents [number to number]. These documents were released in part with only irrelevant information deleted in accordance with section 25.

My review focuses on the remaining documents, Documents [number to number]. I am satisfied these documents contain information that is either outside the scope of the Applicant's request or exempt from release under section 33(1).

As I am satisfied it is not practicable to provide the Applicant with an edited copy of these documents with exempt and irrelevant information deleted in accordance with section 25, access is refused in full.

My reasons for decision follow.

**Joanne Kummrow**  
Public Access Deputy Commissioner  
5 April 2023

## Reasons for Decision

### Background to review

1. The Applicant, as the representative for their client, made a request to the Agency seeking access to the following documents:

We act on behalf of an individual who attended [Name of school] between the approximate years of [year] and [year] who alleges [they were] sexually abused by a [description of] teacher throughout the period of [year to year]. We are in the process of attempting to identify our clients abuser, and would be grateful if you could please assist us by providing the following information and/or documents:

1. Any staff photographs you may have for the years [year to year] ([specified] staff only).
  2. Any list of [description of] staff members for the years [year to year] (inclusive).
  3. Any misconduct reports and/or allegations made against [description of] staff members between [year to year] involving sexual and/or grooming (or any other allegations of misconduct toward students).
2. The Agency refused to grant access to all documents in accordance with the Applicant's request under section 25A(5) determining that all documents, should any exist, would be exempt from release in full under section 33(1). The Agency's decision letter sets out the reasons for its decision.
  3. As permitted under section 25A(5), the Agency did not identify or locate any requested documents the subject of the Applicant's FOI request.

### Review application

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

### Agency fresh decision

5. Section 49M(1) permits an agency to make a fresh decision on an FOI request during a review.
6. Following the provision of further information to the Agency from the Applicant, the Agency elected to reconsider its original decision and determined to process the Applicant's request.
7. On 23 November 2022, the Agency made a fresh decision and identified [number] documents relevant to the Applicant's request. Included in these documents were a series of class photographs depicting or making reference to the Applicant. While some of these photographs were beyond the scope of the Applicant's request, the Agency included them in its decision on the assumption they may be of some assistance to the Applicant.
8. The Agency granted access to four documents in full and refused access to nine documents in full under section 33(1).
9. 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.
10. The Applicant and the Agency were invited to make submissions under section 49H(2) in relation to the review.
11. I have considered all communications and submissions received from the parties.
12. 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.

13. 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.

***Initial view provided by OVIC in relation to additional information in Documents [number to number] released***

14. During the review, OVIC staff provided the Agency with my initial view on its application of section 33(1). In my view, while appreciating the considerations were finely balanced, given the sensitive nature of the request, I did not consider it would be unreasonable to release the names and images of certain individuals in staff photographs, being Documents [number to number].
15. In part this view was formed based on considering the circumstances and reason for the documents' creation. I considered school staff voluntarily participated in such photos with no expectation of confidentiality or further control over the resulting photographs. In my view, school staff likely had an understanding that others would view the photographs or they may be publicly disseminated such as in a newsletter, year book or displayed within school grounds.
16. Having considered my initial view, the Agency determined to release further documents to the Applicant. On [date], the Agency provided the Applicant with copies of Documents [number to number], being staff photographs, with only information falling outside the terms of the Applicant's request deleted in accordance with section 25.
17. Following receipt of Documents [number to number], the Applicant confirmed they continued to seek review of the remaining documents, being Documents [number to number], which relate to point 3 of the Applicant's FOI request.
18. OVIC staff made further enquires with the Agency about potentially missing pages and sought confirmation that there were no other versions of the documents available, as Document [number] was of poor quality. In response, the Agency undertook further searches and while it was unable to locate a better quality version of Document [number], it advised that two pages of this document had inadvertently been excluded. The Agency provided these additional pages to OVIC and advised it considers these pages contain information irrelevant to the terms of the Applicant's request. These additional pages of Document [number] have been incorporated into my review of Documents [number to number].

**Review of exemption**

***Section 33(1) – Documents affecting a third party's personal privacy***

19. 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'.

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

*Do the documents contain third party personal affairs information?*

20. 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.<sup>2</sup>
21. 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>
22. Documents [number to number] are letters authored by Agency staff detailing misconduct allegations involving staff. The documents were created outside the time period of the Applicant's request but contain brief references to the date range specified in the Applicant's request.
23. Documents [number and number] appear to be draft versions of the final letter in Document [number] dated in [month year], rather than separate letters.
24. Document [number] comprises a separate two page letter and a fax cover sheet. The content of Document [number] dated in [month year] is similar in nature to that in Documents [number to number] dated in [month year].
25. I am satisfied these documents contain a third party personal affairs information, including names, position titles, contact details, private location information and staff opinions and observations relating to third parties from which they could be identified.

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

26. 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.
27. 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 [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>
28. As per its decision letter, the Agency submits the release of the personal affairs information of several third parties would be unreasonable based on a number of factors including:
  - (a) the information is highly sensitive in nature;
  - (b) disclosure of the information may cause stress and anxiety for an individual affected;
  - (c) a portion of the information concerns unsubstantiated allegations of misconduct or improper conduct;

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<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.*

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

- (d) disclosure of the information would be reasonably expected to harm the interests of a third party; and
  - (e) disclosure of the information would be reasonably expected to prejudice the protection of an individual's right to privacy.
29. In determining whether disclosure of the third parties' personal affairs information would be unreasonable in this matter, I have considered the above points in addition to the following factors:<sup>7</sup>
- (a) the nature of the personal affairs information;
  - (b) the circumstances in which the Agency obtained the information;
  - (c) the Applicant's interest in obtaining access to the information;
  - (d) whether release of the information would promote any public interest;
  - (e) whether any individuals to whom the information relates object, or would be likely to object to the release of the information; and
  - (f) the likelihood disclosure of the information would cause distress or anxiety to individuals to whom it relates.
30. In determining whether disclosure of a document would involve the unreasonable disclosure of information relating to the personal affairs of any person, I must also take into account whether the disclosure of the information would, or would be reasonably likely to, endanger the life or physical safety of any person.<sup>8</sup> However, I do not consider this is a relevant factor in these circumstances.
31. I consider the personal affairs information is highly sensitive in terms of its content and context. It was obtained by the Agency in the course of it addressing sensitive allegations concerning staff misconduct. Ensuring the confidentiality of certain information relating to third parties is fundamental to the Agency being able to appropriately collect information to aid investigation into serious allegations of staff misconduct and take necessary action. If students and staff are unable to record sensitive and personal information in the context of, and for the purpose of, investigating complaints relating to student safety, the appropriateness and quality of actions to address complaints may suffer as a result.
32. 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>9</sup> I acknowledge the Applicant's genuine interest in obtaining access to the remaining documents to assist their client in pursuing redress for alleged abuse they suffered as a child. I appreciate the significant sensitivity underpinning this purpose. From my review of the documents, the redacted information does not appear to relate in any way to the Applicant's client; however, I cannot comment further on whether release of this content would assist the Applicant in relation to seeking redress.
33. I consider there is strong public interest in individuals who have suffered child abuse in public institutions, such as schools, being able to seek justice and seek to protect others. This is enshrined through the National Redress Scheme which provides support to people who experienced institutional child sexual abuse and was created in response to recommendations made by the Royal Commission into Institutional Responses to Child Sexual Abuse.

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<sup>7</sup> Ibid.

<sup>8</sup> Section 33(2A).

<sup>9</sup> *Victoria Police v Marke* [2008] VSCA 218 at [104].

34. I also consider there is public interest weighing in favour of preserving the Agency's ability to record sensitive and personal information about third parties for the purpose of being able to appropriately address and respond to allegations of abuse or misconduct made against staff. In the event such information were to be routinely released under the FOI Act in circumstances where allegations had not been tested or substantiated, I am satisfied the integrity and efficacy of the Agency's ability to perform its functions may be compromised.
35. As the FOI Act does not place any restrictions on an applicant's use or dissemination of documents 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>10</sup> I accept dissemination of the documents, if released to the Applicant, would impact the personal privacy of the third parties whose information is recorded in the documents should they be further disseminated. However, I have also taken into account the purpose for which the Applicant seeks access to third party personal affairs information and to balance the competing factors in favour and against disclosure in matter of this nature.
36. In deciding 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.<sup>11</sup> However, this obligation does not arise in certain circumstances, including if it is not practicable to do so.<sup>12</sup>
37. Given the age of the documents, and the lack of current contact information for third parties, the Agency determined that consultation would not be practicable. I accept the Agency's views on consultation in these circumstances. In any case, I consider it is likely the relevant individuals would object to the release of their personal affairs information given the purpose for which it is sought.
38. After carefully balancing the above factors, I am satisfied disclosure of certain third party personal affairs information would be unreasonable in the circumstances. Accordingly, I am satisfied certain information in the documents is exempt from release under section 33(1).
39. My decision on section 33(1) for each document is set out in the Schedule of Documents in **Annexure 1**.

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

40. 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.
41. 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>
42. In relation to Documents [number to number], including the additional pages located during the review, I agree the information the Agency deleted as irrelevant is beyond the scope of the Applicant's request as it relates to matters occurring outside the time period specified in the request.

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<sup>10</sup> Ibid at [68].

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

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

<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], [155].

43. I have carefully considered whether Documents [number to number] can be released with irrelevant and exempt information redacted. In my view, it is not practicable for the Agency to do this because the required deletions would render these documents meaningless.

### **Conclusion**

44. On the information before me, I am satisfied all information in Documents [number to number] is either irrelevant to the terms of the Applicant's FOI request or exempt from release under section 33(1).
45. As I am satisfied it is not practicable to provide the Applicant with an edited copy of documents with irrelevant and exempt information deleted in accordance with section 25, access to Documents [number to number] is refused in full.
46. The Schedule of Documents in **Annexure 1** [redacted for publication] sets out my decision on each document.

### **Review rights**

47. 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.<sup>15</sup>
48. 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>
49. 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.
50. The Agency is required to notify the Information Commissioner in writing as soon as practicable after it is advised of any application to VCAT for a review of my decision.<sup>17</sup>

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<sup>15</sup> Section 50(1)(b).

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

<sup>17</sup> Sections 50(3F) and 50(3FA).