

Notice of Decision and Reasons for Decision

Applicant:	'CM4'
Agency:	Racing Victoria Limited
Decision date:	5 January 2021
Exemption and provision considered:	Sections 33(1), 25
Citation:	'CM4' and Racing Victoria Limited (<i>Freedom of Information</i>) [2021] VICmr 3 (5 January 2021)

FREEDOM OF INFORMATION – regulator – investigation – personal affairs information – personal affairs of agency officers – video footage – unreasonable disclosure – emails – internal documents – officers from another agency – investigation records

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 under section 33(1).

As I am satisfied it is practicable to provide the Applicant with an edited copy of certain documents with exempt information deleted in accordance with section 25, I have determined to release these documents in part.

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
5 January 2021

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency seeking access to certain documents. Following consultation with the Agency, the Applicant clarified the terms of their request as follows:

REQUEST A

Letters posted to [Applicant] by Racing Victoria, re: a Racing Victoria Training License [description of License holder]...

REQUEST B

documents, files, findings, notes, reports, and such that Racing Victoria, employees and/or contracts as to:

- [Applicant], the livestock on the property of [Address] and the property of [Address], the type of individuals (limited to Racing Victoria, employees and contractors) are: stewards, veterinarian's, Management staff, health and Safety staff of Racing Victoria;
- there were two meetings, one at [Address] and the other at either [Police Station 1] and/or [Police Station 2];
- People who attended: Racing Victoria Stewards, Victorian Police (Sgt [Name] and others) [another named agency], Inspectors and others, [named Council] officers.

2. In its decision, the Agency advised the Applicant that 'after a thorough and diligent search of our records, we advise that there are no documents in our possession that respond to your Request A'. The Agency provided details of the searches conducted and the reason no documents exist. It also released a document of potential relevance to the Applicant, but outside the terms of their FOI request, outside the FOI Act.
3. In relation to Request B, the Agency identified 20 documents falling within the terms of the Applicant's request. The Agency advised these documents are identical to those located under a previous FOI request submitted by the Applicant dated [date] and referred the Applicant to the Agency's decision for that request dated [date]. I note the Applicant made an application to the Information Commissioner seeking review of that earlier decision, but subsequently withdrew their review application.
4. Documents 1-5 and 18-20 are text-based documents while Documents 6-17 comprise digital images and video footage taken by the Agency during an inspection of the property named in the Applicant's request.
5. Consistent with its earlier decision in relation these documents, the Agency released Documents 5 and 18 in full. It refused access to Documents 6 and 11 in full and to all other documents in part under section 33(1). The Agency provided the Applicant with redacted copies of text-based Documents 1-5 and 18-20. It advised the Applicant that they could inspect Documents 7-10 and 12-17, being digital images and video footage, at the Agency's headquarters by appointment. The Agency's decision letter sets out the reasons for its decision and also provides the Applicant with additional details of searches conducted to identify documents relevant to the terms of Request B.

Review

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

7. I have examined copies of the documents subject to review.
8. I have considered all relevant 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.

Applicant's adequacy of search and Agency handling concerns

11. Alongside their review application, the Applicant raised concerns regarding the adequacy of the Agency's search for relevant documents and its requirement the Applicant attend its premises to inspect certain documents rather than being provided with physical copies.
12. In accordance with section 61B(3), these concerns are addressed as part of my review.
13. OVIC staff made extensive inquiries with the Agency regarding the Applicant's concerns and the Applicant was advised of the findings concluded following those inquiries.
14. In the circumstances, I am satisfied the Applicant's concerns have been addressed to the fullest extent possible in that I am satisfied the Agency conducted a thorough and diligent search and no further action is required in regard to the Applicant's concerns.

Review of exemptions

Section 33(1)

15. 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;¹ and
 - (b) such disclosure would be 'unreasonable'.
16. Information relating to a person'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.²
17. Personal affairs information that relates to an individual 'concerns or affects that person as an individual'.³
18. Further, 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.⁴

¹ Sections 33(1) and (2).

² Section 33(9).

³ *Hanson v Department of Education & Training* [2007] VCAT 123.

⁴ *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].

19. A document will disclose personal affairs information if it is capable of, either directly or indirectly, identifying a particular individual whose personal affairs information is 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.⁵

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

20. The information exempted by the Agency in Documents 1-5 and 17-20 is the names and contact information of individuals other than the Applicant (**third parties**).
21. The information exempted by the Agency in Documents 6-16 is the facial features, movements, attire and voices of third parties captured on film.
22. Based on the terms of the Applicant's request, and the nature of the documents subject to review, I am satisfied the documents contain the personal affairs information of third parties including, but not limited to, Agency officers.

Would release of the personal affairs information be unreasonable in the circumstances?

23. The concept of 'unreasonable disclosure' involves balancing the competing public interest in disclosure of official information with the protection of a third party's personal privacy in the circumstances.
24. In the context of this matter, I have considered the following factors:

(a) The nature of the personal affairs information and the circumstances in which it was obtained

The nature of the personal affairs information is the names and contact details of employees of Racing Victoria Limited (**Agency officers**), employees from other government agencies and individuals from other organisations as well as the facial features, movements, attire and voice of some of those third parties.

Certain information was acquired by the Agency in the course of Agency officers' usual work duties and responsibilities. Other third parties' personal affairs information was acquired as part of those individuals' professional duties and responsibilities in their respective agencies and organisations. As such, in most circumstances, I consider the personal affairs information in the documents concern these individuals in their professional roles rather than in their personal or private lives.

I am of the view it will generally be where special circumstances apply only that disclosure of the name of an agency officer, regardless of their seniority, will be unreasonable where an official document records them merely carrying out their usual professional duties or work responsibilities in their context of their employment.

(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.⁶

⁵ *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].

⁶ *Victoria Police v Marke* [2008] VSCA 218 at [104].

The Applicant did not provide reasons to why they seek access to the personal affairs information of third parties in the documents.

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

The Applicant did not provide any specific information as to any public interest 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 affairs information in the documents 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 personal affairs information in the documents to the Applicant in the circumstances of this matter.

(d) 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, where it is practicable and appropriate to do so, an agency must notify that person an FOI request has been received seeking access to a document containing their personal affairs information and seek their view as to whether it should be disclosed.

The Agency advises it consulted with third parties, whose personal affairs information appears in the documents, as required under section 33(2B) and provided a summary of these responses for my consideration. While the view of a third party as to disclosure of their personal affairs information is a relevant factor, is not determinative.

However, in this case it is clear from the documents, the Applicant's engagement with the Agency, other agencies and organisations concerning a regulatory investigation involving the Applicant involves matters of a serious nature. Therefore, I consider the context in which the names, as well as other personal affairs information, of the third parties in the documents is sensitive for those individuals. This is reflected in the fact certain third parties named or depicted in the documents objected to the disclosure of their personal affairs information. I consider other third parties would also be reasonably likely to object to the release of their personal affairs information in the document to the Applicant under the FOI Act given the nature of their involvement with the Applicant and the unrestricted nature of release under the FOI Act. As such, I consider the release of this information would be reasonably likely to cause stress and anxiety to those third parties.

(e) Whether disclosure of the information would, or would be reasonably likely to endanger the life or physical safety of any person⁷

I am also required under section 33(2A) to consider whether disclosure of the personal affairs information would, or would be reasonably likely, to endanger the life or physical safety of any person. The term 'any person' is broad and extends to any relevant endangerment involving the safety of an applicant, a related third party or any other person.

In considering this factor, I note VCAT has held physical safety is not concerned solely with actual safety, but also with the perception of the relevant person as to whether he or she is

⁷ Section 33(2A).

safe.⁸ Similarly, VCAT has found the maker of the documents in question may have a perception of fear if their personal information were disclosed.⁹

Having reviewed the Agency's submission along with the confidential responses from individuals who were consulted under section 33(2B), I consider this is a relevant factor when assessing the release of certain individuals' personal affairs information to the Applicant.

I have also taken into consideration the Applicant did not provide any reason for seeking access to the personal affairs information of Agency officers and other persons named in the documents such that any such reason could be balanced with the concerns raised.

25. On balance, having weighed up the above factors and carefully considered the content of and circumstances surrounding the creation of the documents, I am satisfied their disclosure in full would involve the unreasonable disclosure of third parties' personal affairs information. As such, I am satisfied personal affairs information in the documents is exempt under section 33(1).

Deletion of exempt or irrelevant information

26. Section 25 requires an agency to grant access to an edited copy of a document when 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'¹⁰ 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 25.¹¹
28. Having reviewed the content of the documents, I am satisfied the information deleted by the Agency in Documents 1, 3, 4, 19 and 20, in accordance with section 25, is appropriate. Similarly, I am satisfied it would not be practicable to prepare edited versions of Documents 6 and 11, as deleting the exempt information would render these documents meaningless.

Conclusion

29. My decision on the Applicant's request is the same as the Agency's decision.
30. I am satisfied the personal affairs information of third parties in the documents is exempt under section 33(1).
31. Where I am satisfied, in accordance with section 25, it is practicable to delete the exempt information, as well as information irrelevant to the Applicant's request, I have determined to release those documents in part.
32. The Schedule of Documents in **Annexure 1** sets out my decision in relation to each document.

⁸ *O'Sullivan v Police (Vic)* (2005) 22 VAR 426; [2005] VCAT 532 at [19].

⁹ *Morse v Building Appeals Board (No 2)* [2007] VCAT 2344 at [15].

¹⁰ *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].

¹¹ *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

33. If they are not satisfied with my decision, the Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹²
34. 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.
35. The Agency is required to notify the Information Commissioner in writing as soon as practicable if an application to VCAT for a review of my decision is made.¹³
36. If an application is made to VCAT, my decision will be subject to any VCAT determination.

¹² Section 52(5).

¹³ Sections 50(3F) and (3FA).

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comment
1.	[date]	E-mail to [separate government Agency] regarding [livestock] seized on [date]	1	Refuse in part Section 33(1)	Release in part Sections 33(1), 25 The document is to be released except for information that is exempt under section 33(1) or irrelevant, which is to be deleted in accordance with section 25, being: <ul style="list-style-type: none">the redactions made by the Agency in the document.	<p>Section 33(1): The document contains the personal affairs information of persons other than the Applicant, being their names and contact information. I am satisfied the disclosure of the personal affairs information the Agency determined is exempt under section 33(1) would be unreasonable to disclose for the reasons outlined above.</p> <p>Section 25: I am satisfied the document contains information that is irrelevant to the request, being the full name of the FOI Officer who processed the document. I am satisfied it is practicable to provide the Applicant with an edited copy of the document with exempt and irrelevant information deleted in accordance with section 25.</p>
2.	[date]	Spreadsheet with [details of livestock]	1	Refuse in part Section 33(1)	Release in part Sections 33(1), 25 The information removed by the Agency is to remain deleted in accordance with section 25, as it is exempt section 33(1).	Sections 33(1) and 25: See comments for Document 1 above.

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Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comment
3.	[date]	E-mail providing Agency staff	2	Refuse in part Section 33(1)	Release in part Sections 33(1), 25 The information removed by the Agency is to remain deleted in accordance with section 25, as it is exempt under section 33(1) or irrelevant.	Section 33(1) and 25: See comments for Document 1 above. Section 25: I am satisfied the document contains information that is irrelevant to the Applicant's FOI request, being historical information regarding an external organisation's experience in other equine welfare matters.
4.	[date]	E-mail providing [details of livestock] and research undertaken	2	Refuse in part Section 33(1)	Release in part Sections 33(1), 25 The information removed by the Agency is to remain deleted in accordance with section 25, as it is exempt under section 33(1) or irrelevant.	Section 33(1) and 25: See comments for Document 1 above. Section 25: I am satisfied the document contains information that is irrelevant to the Applicant's FOI request, being background information from previous attendances at the property identified in the request.
5.	[date]	Letter to the [third party]	1	Released in full	Not subject to review	
6.	[date]	Footage taken at inspection of property (00:36)	N/A	Refuse in full Section 33(1)	Refused in full Section 33(1)	Section 33(1): The document contains the personal affairs information of third parties, being facial features, movements, attire and voice captured on film. I am satisfied the disclosure of the personal affairs information

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Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comment
						<p>the Agency determined is exempt under section 33(1) would be unreasonable for the reasons outlined above.</p> <p>Section 25: I am satisfied it would not be practicable to provide the Applicant with an edited copy of the document with exempt information deleted in accordance with section 25, as to do so would render the document meaningless.</p>
7.	[date]	Footage taken at inspection of property (00:37)	N/A	<p>Refuse in part</p> <p>Section 33(1)</p>	<p>Release in part</p> <p>Sections 33(1), 25</p> <p>The information removed by the Agency is to remain deleted in accordance with section 25, as it is exempt section 33(1).</p>	<p>Section 33(1): See comments for Document 6 above.</p> <p>Section 25: I am satisfied it is practicable to provide the Applicant with an edited copy of the document with exempt information deleted in accordance with section 25.</p>
8.	[date]	Footage taken at inspection of property (02:32)	N/A	<p>Refuse in part</p> <p>Section 33(1)</p>	<p>Release in part</p> <p>Sections 33(1),25</p> <p>The information removed by the Agency is to remain deleted in accordance with section 25, as it is exempt section 33(1).</p>	<p>Section 33(1): See comments for Document 6 above.</p> <p>Section 25: See comments for Document 7 above.</p>

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comment
9.	[date]	Footage taken at inspection of property (01:55)	N/A	Refuse in part Section 33(1)	Release in part Sections 33(1), 25 The information removed by the Agency is to remain deleted in accordance with section 25, as it is exempt section 33(1).	Section 33(1): See comments for Document 6 above. Section 25: See comments for Document 7 above.
10.	[date]	Footage taken at inspection of property (04:22)	N/A	Refuse in part Section 33(1)	Release in part Sections 33(1),25 The information removed by the Agency is to remain deleted in accordance with section 25, as it is exempt section 33(1).	Section 33(1): See comments for Document 6 above. Section 25: See comments for Document 7 above.
11.	[date]	Footage taken at inspection of property (01:15)	N/A	Refuse in full Section 33(1)	Refuse in full Sections 33(1), 25	Sections 33(1) and Section 25: See comments for Document 6 above.
12.	[date]	Footage taken at inspection of property (00:38)	N/A	Refuse in part Section 33(1)	Release in part Sections 33(1),25 The information removed by the Agency is to remain deleted in accordance with	Section 33(1): See comments for Document 6 above. Section 25: See comments for Document 7 above.

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Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comment
					section 25, as it is exempt section 33(1).	
13.	[date]	Footage taken at inspection of property (00:38)	N/A	Refuse in part Section 33(1)	Release in part Sections 33(1),25 The information removed by the Agency is to remain deleted in accordance with section 25, as it is exempt section 33(1).	Section 33(1): See comments for Document 6 above. Section 25: See comments for Document 7 above.
14.	[date]	Footage taken at inspection of property (02:44)	N/A	Refuse in part Section 33(1)	Release in part Sections 33(1), 25 The information removed by the Agency is to remain deleted in accordance with section 25, as it is exempt section 33(1).	Section 33(1): See comments for Document 6 above. Section 25: See comments for Document 7 above.
15.	[date]	Footage taken at inspection of property (02:54)	N/A	Refuse in part Section 33(1)	Release in part Sections 33(1),25 The information removed by the Agency is to remain deleted, in accordance with section 25, as it is exempt	Section 33(1): See comments for Document 6 above. Section 25: See comments for Document 7 above.

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Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comment
					sections 33(1).	
16.	[date]	Footage taken at inspection of property (02:25)	N/A	Refuse in part Section 33(1)	Release in part Sections 33(1),25 The information removed by the Agency is to remain deleted in accordance with section 25, as it is exempt section 33(1).	Section 33(1): See comments for Document 6 above. Section 25: See comments for Document 7 above.
17.	[date]	Photo taken during inspection of property	N/A	Refuse in part Section 33(1)	Release in part Sections 33(1), 25 The information removed by the Agency is to remain deleted in accordance with section 25, as it is exempt section 33(1).	Section 33(1): The document contains the personal affairs information of third parties, being facial features, movements and attire captured in a digital image. I am satisfied the disclosure of the personal affairs information the Agency determined is exempt under section 33(1) would be unreasonable to disclose for the reasons outlined above. Section 25: See comments for Document 7 above.
18.	[date]	Show cause notice	2	Released in full	Not subject to review	
19.	[date]	Diary notes regarding the [hearing type] held	3	Refuse in part Section 33(1)	Release in part Sections 33(1),25	Sections 33(1) and 25: See comments for Document 1 above. Section 25: I am satisfied the

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Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comment
		at [named] Police Station			The information removed by the Agency is to remain deleted in accordance with section 25, as it is exempt under section 33(1) or irrelevant.	document contains information that is irrelevant to the Applicant's FOI request, being diary notes taken on 4 April 2016 in relation to other matters.
20.	[date]	E-mail serving legal representative with Show Cause Notice	2	Refuse in part Section 33(1)	Release in part Sections 33(1), 25 The information removed by the Agency is to remain deleted in accordance with section 25, as it is exempt under section 33(1) or irrelevant.	Sections 33(1) and 25: See comments for Document 1 above.