

Notice of Decision and Reasons for Decision

Applicant: 'CP9'

Agency: Murrindindi Shire Council

Decision Date: 4 February 2021

Exemption considered: Section 33(1)

Citation: *'CP9' and Murrindindi Shire Council (Freedom of Information) [2021]*
VICmr 36 (4 February 2021)

FREEDOM OF INFORMATION – council documents – planning amendment scheme – cemetery trust – community consultation – letters of support – personal affairs information – unreasonable disclosure

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.

I am satisfied certain information in the document is exempt under section 33(1). However, I am not satisfied all personal affairs information is exempt under section 33(1).

As I am satisfied it is practicable to delete exempt information from the document in accordance with section 25, I have determined to grant access to the document in part.

The Schedule of Documents in Annexure 1 sets out my decision in relation to the document.

My reasons for decision follow.

Joanne Kummrow

Public Access Deputy Commissioner

4 February 2021

Reasons for Decision

Background to review

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

At an Ordinary Council Meeting held on [date] an application was made 8.1 Planning Scheme Amendment Request 265 [location in Victoria] Cemetery Proposal.

In the attachment to the submission there was an Appendices Letters of Support for proposed cemetery.

The Council minutes note that these documents were removed and distributed to Councillors Separately!

Our request is for copies of these documents to be made available.

2. In its decision, the Agency identified one document falling within the terms of the Applicant's request and granted access to the document in part. The Agency relied on the exemption in section 33(1) to refuse access to certain information.

Review

3. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
4. I have examined a copy of the document 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 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)

9. A document is exempt if two conditions are satisfied:
 - (a) disclosure of the document under the FOI act would 'involve disclosure of information relating to the 'personal affairs' of a person other than the Applicant;¹ and
 - (b) such disclosure would be 'unreasonable'.

¹ Sections 33(1) and (2).

Does the document contain personal affairs information?

10. Information relating to a person's 'personal affairs' includes any 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
11. 'Personal affairs information' is interpreted broadly to include matters in relation to the health, private behaviour, home life, personal or family relationships of individuals.³
12. The document contains the names, addresses and signatures of third parties who provided letters of support for the establishment of a cemetery in the [location] area as well as the name of a third party associated with the [location] Cemetery Trust.
13. The document also contains comments provided by third parties in their letters of support. I am satisfied this information relates to those individuals' personal lives and family relationships.
14. I am satisfied the above information is 'personal affairs information' for the purposes of section 33(1).

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

15. 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 person other than an applicant (a **third party**).⁴
16. The nature of disclosure of a document under the FOI Act is unconditional and unrestricted, which means an applicant is free to disseminate widely or use a document as they choose following its release.⁵
17. In an appeal concerning the operation of section 33(1), the Victorian Court of Appeal held:⁶

On the contrary, it stipulates as the only condition for the determination of whether a document is an exempt document that the disclosure of the exempt document 'would involve the unreasonable disclosure of information relating to the personal affairs of any person'.

The very significant public interest sought to be protected by that condition, namely the right of any person to have his or her personal affairs kept private, suggests to me that the condition should not be construed narrowly. Section 33(1) of the Act is the legislature's attempt to reconcile two important, but competing, objectives: the public interest in disclosure and the personal interest of privacy. The mechanism chosen by the legislature to reconcile those objectives is to require a decision-maker to balance them against each other by identifying and inquiring into the facts relevant to that balancing process and making an evaluation of which is to prevail. The condition posed by section 33(1) for its application depends, like that in section 35(1)(b) and others, upon a question dependent upon the particular facts of an actual application. [Footnotes removed]

18. 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 a document containing their personal information and seek their views on disclosure of the information.⁷ The obligation is subject to certain exceptions.⁸

² Section 33(9).

³ *Re F and Health Department* (1988) 2 VAR 458 as quoted in *RFJ v Victoria Police FOI Division* [2013] VCAT 1267 at [103].

⁴ *Re Page v Metropolitan Transit Authority* (1988) 2 VAR 243 at 245-6.

⁵ *Victoria Police v Marke* [2008] VSCA 218 at [68].

⁶ *Victoria Police v Marke* [2008] VSCA 218 at [95].

⁷ Section 33(2B).

⁸ Section 33(2C).

19. The Agency determined it was not practicable to consult with third parties given the number of third parties whose personal affairs information appears in the document. However, the Agency advised OVIC staff they received community feedback regarding concerns about the release of personal affairs information. In response, OVIC staff made inquiries with the Agency to determine whether certain third parties had been consulted and sought further information from the Agency regarding the community feedback received. However, the Agency did not provide a response to these inquiries.
20. While I appreciate the Applicant's personal interest in the information, I have determined it would be unreasonable to release the personal affairs information of certain third parties. In doing so, I have considered the following factors:

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

I am of the view the third parties provided letters of support on a confidential basis with the understanding their correspondence would be used to assist in the Agency's decision making process regarding the planning amendment application and would not be disclosed by means of an FOI request.

However, I consider certain information was acquired by the Agency as part of an individual's work duties and responsibilities in their role with the [location] Cemetery Trust. As such, I consider the name and contact details of that individual concern them in their professional capacity, rather than in their personal or private life.

(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 of an individual's personal affairs information would be unreasonable in the circumstances.⁹

The Applicant advises they seek full access to the document for the following reasons:

The documents requested from Council were documents submitted by individuals and groups in support of a Planning Amendment Application. These documents were used by the Applicant, The [location] Cemetery Trust, for the Planning Amendment as supporting evidence of community people agreeing with their position. It is impossible to authentic [sic] that these supporting documents were from real people or real groups without the verification of the personal details and information. If they were collected and signed then the people signing would have known that their support would likely be made public just like a petition.

The Minister of Health has claimed that these [number of] signatures confirm support for the [location] Cemetery. There are some critically important Governance issues that we have raised with the [another Victorian Government Agency]. However, without the ability to investigate who these personal signatures are it is not possible to investigate their validity. Likewise, it is not possible to confirm that due diligence was undertaken by Murrindindi Council without the personal details being made available under FOI.

I acknowledge the Applicant's interest in ensuring that proper procedures were followed in relation to the 'Planning Amendment Application'.

⁹ *Victoria Police v Marke* [2008] VSCA 218 at [104].

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

While I acknowledge there is a public interest in the Agency following proper procedures when making planning decisions that will impact upon the community, I consider there is a competing interest in individuals being able to maintain their privacy when participating voluntarily in a community consultation process.

There is a public interest in ensuring the Agency is able to engage the community in similar consultation processes in the future, as in my view, meaningful community participation contributes to increased public confidence and trust in government decision making processes.

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

As noted above, the Agency did not provide specific information as to whether any individual objects to the release of their personal affairs information.

However, in the circumstances, I am satisfied the third parties would be reasonably likely to object to the release of their personal affairs information.

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

The nature of disclosure under the FOI Act is unconditional and unrestricted, which means an applicant is free to use or disseminate a document as they choose once it is released.¹⁰

On balance, I consider there is a reasonable possibility the Applicant would further disclose or use the personal affairs information of the individuals who wrote letters of support. In the context of this matter, I consider the further use of this information would interfere with these individuals right to privacy.

(f) Whether the disclosure of 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 take into account whether disclosure of the information would, or would be reasonably likely to, endanger the life or physical safety of any person.¹¹ I do not consider this to be a relevant factor in this matter.

21. In balancing the above factors, I have determined the public interest in protecting the personal privacy of third parties outweighs the Applicant's personal interest in the information.
22. Accordingly, I am satisfied it would be unreasonable to disclose certain personal affairs information contained in the document.
23. However, I am satisfied disclosure of the personal affairs information of a third party, where the information relates to an individual in the ordinary course of their professional duties would not be unreasonable.
24. Accordingly, I am not satisfied disclosure of such information in the document would be unreasonable and it is not exempt under section 33(1).

¹⁰ Ibid at [68].

¹¹ Section 33(2A).

Deletion of exempt or irrelevant information

25. Section 25 requires an agency to grant access to an edited copy of a document when it is practicable for the agency or Minister to delete exempt or irrelevant information and the applicant agrees to receiving such a copy.
26. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'¹² and the effectiveness of the deletions. Where deletions would render the document meaningless, they are not 'practicable', and release of the document is not required under section 25.¹³
27. I have considered the effect of deleting exempt information from the document. In my view, it is practicable for the Agency to delete the exempt information, because it would not require substantial time and effort, and the edited document would retain meaning.

Conclusion

28. On the information before me, I am satisfied certain information in the document is exempt under section 33(1). However, I am not satisfied all personal affairs information is exempt under section 33(1).
29. As I am satisfied it is practicable to delete exempt information from the document in accordance with section 25, I have determined to grant access to the document in part.
30. The Schedule of Documents in **Annexure 1** sets out my decision in relation to the document.

Review rights

31. 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.¹⁴
32. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹⁵
33. 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.
34. 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

Third party review rights

35. As I have determined to release a document that contains the personal affairs information of individuals other than the Applicant, if practicable, I am required to notify those persons of their right to seek review by VCAT of my decision within 60 days from the date they are given notice.¹⁷

¹² *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].

¹³ *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].

¹⁴ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

¹⁵ Section 52(5).

¹⁶ Sections 50(3F) and (3FA).

¹⁷ Sections 49P(5), 50(3) and 52(3).

36. In considering the meaning of 'practicable' in relation to other sections of the FOI Act, VCAT has stated the following:

The use of the word 'practicable' in the legislation to my mind connotes a legislative intention to apply common sense principles. 'Practicable' is not a term of art or a term of precise meaning.

... The use of the word indicates there should be imported into the process the exercise of judgment by the agency concerned. It does not allow for the conclusion that because a task is possible, it must, ergo, be undertaken.¹⁸

37. VCAT also considers the possibility of an unnecessary intrusion into the lives of third parties is relevant when assessing the practicability of notifying them.¹⁹
38. On balance, I am satisfied it is practicable to notify a third party of their review rights and the relevant third party will be notified as at the date of this decision.

When this decision takes effect

39. My decision does not take effect until the third parties' 60 day review period expires.

¹⁸ *Re Schubert and Department of Premier and Cabinet* (2001) 19 VAR 35 at [45].

¹⁹ *Coulston v Office of Public Prosecutions Victoria* [2010] VCAT 1234 at [42].

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	Number of Pages	Agency Decision	OVIC Decision	OVIC Comments
1.	[date]	Letters of support	164	Released in part Sections 33(1), 25	<p>Release in part</p> <p>Sections 33(1), 25</p> <p>The document is to be released with the following information deleted in accordance with section 25, as it is exempt under section 33(1):</p> <ul style="list-style-type: none"> All information deemed exempt by the Agency on pages 3 to 164. <p>Information the Agency determined is exempt on pages 1 and 2 is to be released.</p>	<p>Section 33(1): I am satisfied it would be unreasonable to release certain personal affairs information in the document for the reasons outlined in the Notice of Decision above.</p> <p>However, I am not satisfied it would be unreasonable to release certain personal affairs information an individual where the information appears in an official document and concerns them in their professional capacity, rather than in their personal or private life.</p> <p>Section 25: I am satisfied it is practicable to release an edited copy of the document with exempt information deleted in accordance with section 25.</p>