

## Notice of Decision and Reasons for Decision

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Applicant:	'DU6'
Agency:	Victoria University
Decision date:	15 October 2021
Provision and exemptions considered:	Sections 25, 30(1), 32(1), 33(1), 35(1)(b), 36(1)(b)
Citation:	'DU6' and <i>Victoria University (Freedom of Information)</i> [2021] 313 (15 October 2021)

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FREEDOM OF INFORMATION – university records – workplace conduct – workplace investigation – personal affairs information of third parties – practicable to edit document

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 differs from the Agency's fresh decision in that I have decided to release additional information in the document.

I am not satisfied the document is exempt from release under sections 30(1), 32(1), 35(1)(b) and 36(1)(b).

I am satisfied certain information in the document is exempt under section 33(1).

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

To assist the Agency, I have provided it with a marked-up copy of the document indicating exempt and irrelevant information in accordance with my decision.

My reasons for decision follow.

**Joanne Kummrow**  
Public Access Deputy Commissioner

15 October 2021

## Reasons for Decision

### Background to review

1. The Applicant made a request to the Agency seeking access to certain documents.
2. Following consultation with the Agency, the Applicant amended the initial request.
3. The amended request seeks access to the following documents:

For the period of [date] until [date], the following documents held in the [named person's] office, where one or more staff member of the university is accused of misconduct:

- a) If an investigation of an allegation of staff misconduct has been completed, the final investigation report or, if that report has an executive summary or equivalent, only that summary;
- b) If an investigation of an allegation of staff misconduct has not been completed, a copy of the initial complaint or allegation,

but not including any names, addresses, phone numbers, details of what a person was studying or any dates apart from a year.

4. The Agency relied on section 25A(5) to refuse to grant access to any documents responsive to the Applicant's request as it considered any documents falling within the terms of the Applicant's request, should any exist, would be exempt from release under section 33(1). The Agency's decision letter of [date] sets out the reasons for its decision.

### Review

5. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
6. During the review, the Agency was provided with a preliminary view in relation to the application of the FOI Act to the document.
7. Section 49M(1) permits an agency to make a fresh decision on an FOI request during a review.
8. On 5 August 2021, the Agency made a fresh decision.
9. In its fresh decision, the Agency identified one document (totalling five pages) falling within the terms of the Applicant's amended request. The Agency refused access to the document in full, relying on sections 33(1), 30(1) and 35(1)(b) and determined that partial access under section 25 was not sought or required.
10. 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.
11. I have examined a copy of the document subject to review, which is a report prepared by a senior Agency officer in relation to allegations of misconduct made against an Agency officer.
12. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
13. I have considered all communications and submissions received from the parties.

14. In its submission provided in relation to my review, following the Agency's initial and fresh decisions, it now seeks to rely on two additional exemptions to refuse access to the document: sections 32(1) and 36(1)(b).
15. 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.
16. 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.

### **Scope of my review**

17. The terms of the Applicant's request state that, if a final report exists that has an executive summary, the Applicant seeks access to the executive summary only. The document located by the Agency contains a short executive summary on page 1.
18. Having reviewed the document, I am satisfied the scope of my review relates to page 1 only. Therefore, the remaining pages are irrelevant information for the purposes of section 25.
19. The Agency contends the Applicant did not indicate in their request that they wished to receive an edited copy of any documents with irrelevant or exempt information deleted and as such, my review need not consider the applicability of section 25.
20. 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.
21. I consider the terms of the Applicant's request which excludes 'names, addresses, phone numbers, details of what a person was studying or any dates apart from a year' and seeks access to the executive summary of a final report only (if one exists) clearly indicate the Applicant's willingness to accept an edited copy of a document. In my view, the Applicant's request was framed deliberately with a range of dependent conditions, which, where met, explicitly seek access to an edited copy of the document in accordance with section 25.
22. I consider this conclusion is consistent with and furthers the object of the FOI Act. I further note the beneficial nature of the FOI Act, which Parliament intends not be interpreted in a narrow or overly technical or legalistic way so as to limit access to government held information.

### **Review of provision and exemptions**

#### ***Section 33(1) – Personal affairs information of third parties***

23. 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 (2).

*Does the document contain personal affairs information?*

24. Information relating to an individual'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>
25. 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>
26. The Agency engaged an external consultant to conduct a workplace investigation into allegations of misconduct by an Agency officer. In these circumstances, I consider the investigator is a consultant engaged by the Agency, and therefore is an agency officer for the purposes of section 33(1).
27. As noted above, my review concerns the executive summary on page 1 only. This page contains the names, position titles, gender identifiers, as well as details of actions and behaviours of Agency officers.
28. I am satisfied this information relates to the personal affairs information of third parties.
29. The terms of the Applicant's request do not seek access to certain personal affairs information, namely, any personal names, addresses, telephone numbers, details of what a person was studying or any dates apart from the relevant year. As such, such information is irrelevant and not subject to my review.
30. I have considered the application of section 33(1) to any remaining information.

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

31. The concept of 'unreasonable disclosure' involves balancing the public interest in the disclosure of official information with the interest in protecting an individual's personal privacy in the circumstances of a matter.
32. The Victorian Court of Appeal has held there is 'no absolute bar to providing access to documents which relate to the personal affairs of others.'<sup>4</sup> 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'.
33. I consider the following factors are relevant in determining whether disclosure of personal affairs information would be unreasonable in the circumstances:

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

The personal affairs information in this document was obtained by the Agency in the course of investigating allegations made about an Agency officer regarding their workplace conduct.

In relation to the personal affairs information of agency officers, the Victorian and Civil Administrative Tribunal (**VCAT**) has accepted there is nothing particularly sensitive about matters concerning or arising out of the course of a person's official duties.<sup>5</sup>

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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> *Victoria Police v Marke* [2008] VSCA 218 at [76].

<sup>5</sup> *Milthorpe v Mt Alexander Shire Council* (1997) 12 VAR 105.

However, I accept investigations conducted by a public sector organisation into allegations made against an agency officer in relation to their workplace conduct are inherently sensitive in nature, particularly where access is sought by a third party.

- (b) The likelihood of further disclosure of the information, if released under the FOI Act, which provides for the unrestricted and unconditional release of document

The nature of disclosure under the FOI Act is unconditional and unrestricted, which means an applicant is free to disseminate widely or use a document as they choose once it is released.<sup>6</sup>

I note the Applicant is associated with a media organisation with an interest in reporting publicly on the matters of public interest. While I acknowledge the Applicant advises they do not seek access to certain types of personal affairs information, I consider there is a small amount of additional information in the document from which a third party potentially could be identified. Accordingly, I have considered the likelihood of this additional personal affairs information being further disseminated, if disclosed, and the effects broader disclosure of this information would have on the privacy of the relevant third party.

- (c) Whether the individual to whom the information relates objects, or would be likely to object, to the release of their personal affairs information in the documents

The Agency did not consult with third parties to obtain their views regarding the potential release of their personal affairs information.

Having reviewed the document and considered the circumstances in which it was prepared, I consider the relevant third parties, in particular the individual the subject of the complaint, would not expect their personal information would be provided to an unrelated third party. As such, I consider it is reasonably likely those individuals would object to the disclosure of their personal affairs information in the documents.

However, while this factor weighs against disclosure, it is not a wholly determinative factor.

- (d) The Applicant's interest in the information, and whether their purpose for seeking the information is likely to be achieved through disclosure

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.<sup>7</sup>

The Applicant submits they did do wish to receive any personal affairs information of third parties in the documents:

... the document captured should at least be released in part with exempt information, such as personal information, redacted. It would not be rendered useless even if it was to only include the type of misconduct (i.e. sexual), whether it was substantiated, and if so, what, if any action the university took against the perpetrator. This is in the public interest and does not reveal personal information or even specific details provided by the victim.

I also remind the university of its obligations in relation to this matter as was confirmed by the Australian Human Rights Commission (in its report) *Change The Course: National Report on Sexual Assault and Sexual Harassment at Australian Universities (2017)*.

While I acknowledge the Applicant does not seek access to personal affairs information, the facts and circumstances associated with the alleged misconduct along with any actions taken

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<sup>6</sup> *Victoria Police v Marke* [2008] VSCA 218 at [68].

<sup>7</sup> *Ibid* at [104].

by the Agency in response to the allegations (if any) remain sensitive and personal to the third party concerned and may potentially identify a third party.

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

I acknowledge the Applicant's interest in obtaining access to the document and the public interest in the appropriate investigation into and action taken against staff misconduct within a university as a public body with responsibility for and providing educational services to young people. However, I am not satisfied the public interest would be promoted by release of the personal affairs information relating to a confidential workplace investigation in the context of this matter.

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

In determining whether disclosure of personal affairs information would be unreasonable in the circumstances, I must consider whether its disclosure would, or would be reasonably likely to endanger the life or physical safety of any person.<sup>8</sup> However, there is no information before me to indicate this is a relevant factor in this matter.

34. Having weighed up the above factors, I am satisfied disclosure of certain personal affairs information of third parties', which could potentially lead to their reidentification, would be unreasonable in the circumstances.
35. I have considered whether the remainder of the document subject to review is exempt under the other exemptions relied on by the Agency, noting that a small amount of generic information is not exempt under section 33(1) or irrelevant to the request.

***Section 30(1) – Internal working documents***

36. The Agency further claimed the document exempt under section 30(1) which has three requirements:
- (a) the document must disclose matter in the nature of opinion, advice or recommendation prepared by an officer or Minister, or consultation or deliberation that has taken place between officers, Ministers or an officer and a Minister;
  - (b) such matter must be made in the course of, or for the purpose of, the deliberative processes involved in the functions of an agency or Minister or of the government; and
  - (c) disclosure of the matter would be contrary to the public interest.
37. The exemption does not apply to purely factual material in a document.<sup>9</sup>
38. The remainder of the document contains the opinion and advice of an Agency officer that was prepared for the deliberative processes of the Agency, namely the investigation of allegations concerning an Agency officer's workplace conduct.
39. Given the small amount of information remaining in the document, and the general nature of the information, I do not consider its disclosure would have any effect on the Agency. Therefore, I am not satisfied its disclosure would be contrary to the public interest.
40. Accordingly, I am not satisfied the document is exempt under section 30(1).

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

<sup>9</sup> Section 30(3).

### ***Section 35(1)(b) – Information obtained by the Agency in confidence***

41. A document is exempt under section 35(1)(b) if two conditions are satisfied:
- (a) disclosure would divulge information or matter communicated in confidence by or on behalf of a person or a government to an agency or a Minister; and
  - (b) disclosure would be contrary to the public interest as it would be reasonably likely to impair the ability of an agency or a Minister to obtain similar information in the future.
42. Generally, section 35(1)(b) applies to information communicated to an agency from an outside source only, rather than from an officer within an agency. However, in certain circumstances, section 35(1)(b) may apply to confidential information communicated to an agency by an agency officer. For example, in the context of an internal complaint and investigations, or confidential communications between different parts of an agency.<sup>10</sup>
43. I am satisfied information in the document about the particulars of allegation was communicated to the Agency by third parties in relation to a personnel matter. In such circumstances, I accept the third parties provided the information to the Agency with the expectation it would be used for the purpose of addressing the personnel matter and would be treated confidentially.
44. However, the executive summary subject of this review primarily concerns the Agency's final decision and action taken by the Agency, rather than disclosing the content of the report. As such, I do not consider the executive summary contains any information communicated in confidence by a third party to the Agency.
45. Accordingly, as the first limb of section 35(1)(b) is not met, I am not satisfied the document is exempt under section 35(1)(b).

### ***Section 32(1) – Documents subject to legal privilege***

46. In its submission following its fresh decision, the Agency seeks to rely on section 32(1) to the document in full; submitting:
- The document in question is a report prepared by an internal decision-maker and contains a record of communication between the University and an investigator, who is an Australian lawyer and holds a current Victorian practicing certificate.
47. Section 32(1) provides a document is an exempt document 'if it is of such a nature that it would be privileged from production in legal proceedings on the ground of legal professional privilege or client legal privilege' (**legal privilege**).
48. A document will be subject to legal privilege and be exempt under section 32(1) where it contains a confidential communication:<sup>11</sup>
- (a) between the client (or the client's agent) and the client's professional legal advisers, that was made for the dominant purpose of obtaining or providing legal advice or is referable to pending or contemplated litigation;
  - (b) between the client's professional legal advisers and third parties, that was made for the dominant purpose of pending or contemplated litigation; or

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<sup>10</sup> See *Sportsbet v Department of Justice* [2010] VCAT 8 at [71]-[78]; *XYZ v Victoria Police* [2010] VCAT 255 at [287]-[288]; *Birnbauer v Inner and Eastern Health Care Network* (1999) 16 VAR 9 at [17].

<sup>11</sup> *Graze v Commissioner of State Revenue* [2013] VCAT 869 at [29]; *Elder v Worksafe Victoria* [2011] VCAT 1029 at [22]. See also section 119 of the *Evidence Act 2008* (Vic).

- (c) between the client (or the client's agent) and third parties that was made for the purpose of obtaining information to be submitted to the client's professional legal advisers for the dominant purpose of obtaining advice on pending or contemplated litigation.

49. Having reviewed the document, I am not satisfied information contained in the executive summary, which was exempted from release by the Agency, amounts to a confidential communication between the Agency and a legal advisor made for the dominant purpose of providing legal advice in relation to the document.
50. Accordingly, I am not satisfied the executive summary is subject to legal privilege for the purposes of section 32(1).

***Section 36(1)(b) – Disclosure contrary to public interest***

51. Section 36(1)(b) provides a document is an exempt document if:

...

- (b) in the case of documents of a department or prescribed authority its disclosure under this Act would be contrary to the public interest by reason that it would disclose instructions issued to, or provided to for the use or guidance of, officers of an agency on the procedures to be followed or the criteria to be applied in negotiation, including financial, commercial and labour negotiation, in the execution of contracts, in the defence, prosecution and settlement of cases, and in similar activities relating to the financial property or personnel management and assessment interests of the Crown or of an agency.

52. The Agency considers 'the exemption under section 36(1)(b) applies to the document because if disclosed, it would reveal information provided by the investigator to the internal decision-maker, including specific advice as to the allegations of misconduct, for the use or guidance of the decision-maker in coming to their decision in relation to the particular matter'.
53. The Agency further submits:

The case of *United Firefighters Union of Australia - Victoria Branch v Metropolitan Fire and Emergency Services Board*<sup>12</sup> is relevant.

Senior Member Proctor accepted the argument of the Metropolitan Fire and Emergency Services Board that the wording of the section leads to the conclusion that the section applies to a document that if disclosed, would disclose instructions or guidance in relation to a particular transaction or contractual negotiation, as well as instructions that lay down general practices and procedures.<sup>13</sup>

Taking that approach, a document is an exempt document if, disclosure under the FOI Act would be contrary to the public interest by reason that:

1. it would disclose instruction/s issued to, or provided for
2. the use or guidance of, officer/s of the University; on
3. the procedure/s to be followed or the criteria (or criterion) to be applied in negotiation/s, including:
  - i. financial, commercial and labour negotiation/s;
  - ii. in the execution of contract/s;
  - iii. in the defence, prosecution and settlement of case/s; and
  - iv. in similar activity/ies;

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<sup>12</sup> [2018] VCAT 631.

<sup>13</sup> Ibid at [150]-[151].



4. relating to the financial property or personnel management and assessment interests of the University.<sup>14</sup>

There is no need to consider any additional, broader concept of public interest. The exemption applies because it would be contrary to the public interest “by reason that” it would disclose instructions of a certain kind. That is all that is required to be shown.

- 54. I do not accept the Agency’s interpretation of section 36(1)(b). To do so, would mean it could be relied on to exempt a broad range of documents. I do not consider this reasonably reflects the proper application of this provision as intended by Parliament.
- 55. Rather, for a document to be exempt under section 36(1)(b), and on a plain reading of the text, disclosure must be contrary to the public interest as a document would disclose a set of instructions or procedures provided to agency officers in the conduct certain negotiations.
- 56. The information in the document subject to review does not contain any such instructions.
- 57. Accordingly, I am not satisfied the document is exempt under section 36(1)(b).

### **Conclusion**

- 58. On the information before me, I am not satisfied the document is exempt from release under sections 30(1), 32(1), 35(1)(b) and 36(1)(b).
- 59. I am satisfied certain information in the document is exempt under section 33(1).
- 60. As I am satisfied it is practicable to provide the Applicant with an edited copy of the document with irrelevant and exempt information deleted in accordance with section 25, access is granted in part.
- 61. To assist the Agency, I have provided it with a marked-up copy of the document subject to review indicating exempt and irrelevant information in accordance with my decision.

### **Review rights**

- 62. 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>15</sup>
- 63. 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>
- 64. 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>
- 65. 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.
- 66. 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>

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<sup>14</sup> Ibid, p 154.

<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 (3FA).

***When this decision takes effect***

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