

Notice of Decision and Reasons for Decision

Applicant:	'EZ7'
Agency:	City of Ballarat
Decision date:	14 February 2023
Exemptions considered:	Sections 33(1), 35(1)(b)
Citation	'EZ7' and City of Ballarat (Freedom of Information) [2023] VICmr 7 (14 February 2023)

FREEDOM OF INFORMATION – staff survey – staff satisfaction results – disclosure of information provided to agency in confidence contrary to the public interest – verbatim survey responses – third party personal affairs information – disclosure would impair the agency's ability to obtain similar information in the future

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 documents requested by the Applicant under the FOI Act.

My decision on the Applicant's request differs from the Agency's decision in that I have decided to release Document 1 in full, as I am not satisfied it is exempt under sections 33(1) and 35(1)(b).

I am satisfied Document 2 is exempt from release under sections 33(1) and 35(1)(b).

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

14 February 2023

Reasons for Decision

Background to review

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

Full results of City of Ballarat staff satisfaction surveys conducted by City of Ballarat in 2019, 2020 and 2021 with personal or identifying information of City of Ballarat staff redacted.

2. The Agency identified two documents falling within the terms of the Applicant's request and refused access to all documents in full under sections 33(1) and 35(1)(b). The Agency's decision letter sets out the reasons for its decision.

Review application

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 documents subject to review.
5. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
6. I have considered all 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 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.

Review of exemptions

Section 33(1) – Personal affairs information

9. A document is exempt under section 33(1) if two conditions are satisfied:
 - (a) disclosure of the document under the FOI Act would 'involve' the disclosure of information relating to the 'personal affairs' of a person other than the Applicant (a **third party**);¹ and
 - (b) such disclosure would be 'unreasonable'.

Do the documents contain personal affairs information of a third party?

10. Information relating to the 'personal affairs' of another person includes information that identifies any person or discloses their addresses or location. It also includes any information from which such information may be reasonably determined.²
11. 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 the disclosure under the FOI Act is unrestricted

¹ Sections 33(1) and 33(2).

² Section 33(9).

and unconditional, this is to be interpreted by reference to the capacity of any member of the public to identify a third party.³

12. A third party's opinion or observations about another person or group of individuals can constitute a third party's personal affairs information.⁴
13. Document 1 is the Agency staff satisfaction survey results and Document 2 is the verbatim responses from Agency officers about their workplace.
14. I am satisfied the information in Document 2 contains the personal affairs information of third parties which is in the form of verbatim responses to a staff survey. However, I consider that Document 1 does not contain third party personal affairs information, rather it contains a table of data detailing broad employee statistics.

Would disclosure of the personal affairs information be unreasonable?

15. Determining whether disclosure of a third party's personal affairs information would be unreasonable involves balancing the public interest in the disclosure of official information with the interest in protecting a person's personal privacy in the circumstances.
16. In *Victoria v Marke*,⁵ 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'. 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'.⁶
17. In determining whether disclosure of the personal affairs information would be unreasonable in the circumstances, 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 outlined above. The information was obtained by the Agency in response to a staff satisfaction survey.

Document 1 summarises data collected into broad categories. I consider the information in Document 1 not particularly sensitive and does not disclose any personal affairs information that could be used to identify a third party.

Document 2 contains verbatim responses to the survey. I am satisfied the information was provided to the Agency in circumstances where confidentiality was expressed to the participants or in circumstances where there was an expectation of confidentiality. I also consider this document was created for a limited audience and for use in limited circumstances. I consider the nature of the personal affairs information in Document 2 sensitive, given this context.

³ *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].

⁴ *Richardson v Business Licensing Authority* [2003] VCAT 1053, cited in *Davis v Victoria Police (General)* [2008] VCAT 1343 at [43], *Pritchard v Victoria Police (General)* [2008] VCAT 913 at [24], *Mrs R v Ballarat Health Services (General)* [2007] VCAT 2397 at [13].

⁵ [2008] VCSA 218 at [68].

⁶ *Ibid* at [79].

(b) Whether any public interest would be promoted by release of the personal affairs information

I acknowledge there is value in an agency publishing the results of a satisfaction staff survey while also ensuring participants cannot be identified or reidentified. However, while Document 2 does not explicitly identify any individual, I am satisfied there is a reasonable possibility participants and other persons could be identified or reidentified by a person who has or would be reasonably likely to have sufficient knowledge of the Agency's workforce.

In relation to Document 1, I consider there is a public interest in disclosing broad administrative data relating to the Agency's workforce. The release of this information would promote further transparency and government accountability.

(c) The Applicant's interest in the information

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).⁷

Where an applicant's motivation for seeking access to a third party's personal affairs information is more closely related to the applicant's personal interest or curiosity in obtaining the information without a broader public interest, access is more likely to be unreasonable.⁸

The Applicant has not provided a submission as to why they seek access to the information. However, I acknowledge the Applicant is a media outlet and may be seeking access to the information for reporting and publication purposes.

(d) The likelihood of further disclosure of the information, if released under the FOI Act

The information before me suggests this is a significant factor in this review.

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.⁹

I have considered the likelihood of the personal affairs information in Document 2 being further disseminated and the effect its broader disclosure would have on the personal privacy of the relevant third parties.

Given the sensitive nature of this matter in the context of a workplace satisfaction survey, I consider further dissemination of Document 2 would have a detrimental impact on the personal privacy of the relevant third parties. It would also undermine the Agency's processes in determining staff satisfaction, which relies on persons participating in surveys with an assurance of confidentiality.

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

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.¹⁰

⁷ *Victoria Police v Marke* [2008] VSCA 218 at [104].

⁸ *Gunawan v Department of Education* [1999] VCAT 665.

⁹ *Ibid* at [68].

¹⁰ Section 33(2B).

The Agency advised consultation with all relevant third parties was not practicable due to the large number of third parties and the likelihood the third parties would not consent to disclosure of the information given the information was obtained in confidential circumstances.

- (f) Whether disclosure of the 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 consider whether the 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 is a relevant factor in this matter.

18. On the information before me, I am not satisfied Document 1 is exempt under section 33(1). However, I have determined disclosure of information in Document 2 would be unreasonable given the nature of the information and it is exempt from release under section 33(1).

Section 35(1)(b) – Information obtained in confidence

19. A document is exempt from release 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 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.

Was the information obtained in confidence?

20. Whether information communicated by an individual to an agency was communicated in confidence is a question of fact.¹²
21. In doing so, it is necessary to consider the position from the perspective of the communicator, noting confidentiality can be expressed or implied from the circumstances of a matter.¹³
22. In support of its view the information in both documents was communicated to the Agency in confidence, the Agency submitted the following in its decision:
- (a) It was made clear via several staff communications, as well as the survey itself that the survey is completely confidential and anonymous.
 - (b) There was a clear expectation by staff that the survey results would remain confidential.
 - (c) Verbatim responses contained in document 2 reinforce that staff were of the opinion that the survey responses were to remain confidential.
23. Upon consideration of the above information and the information obtained in response to the Agency staff satisfaction survey, I am satisfied assurances were made to the survey participants that their responses would be held in confidence.

¹¹ Section 33(2A).

¹² *Ryder v Booth* [1985] VR 869 at [883]; *XYZ v Victoria Police* [2010] VCAT 255 at [264].

¹³ *XYZ v Victoria Police* [2010] VCAT 255 at [265].

24. I am satisfied it was not practicable for the Agency to consult with third parties in accordance with section 33(2B).¹⁴
25. In the circumstances, I am satisfied Agency employees undertaking the staff satisfaction survey provided information to the Agency in confidence with the assurance that their responses to the survey would be held in confidence.

Would disclosure of the information be contrary to the public interest?

26. Section 35(1)(b) also requires I consider whether the Agency would be impaired from obtaining similar information in the future if the information were to be disclosed under the FOI Act. This involves considering whether others in the position of the communicator would be reasonably likely to be inhibited or deterred from providing similar information to the Agency in the future should the information be disclosed.
27. The public interest test in section 35(1)(b) is narrow, in that it is directed toward the impact release would have on an agency's ability to obtain the same type of information in the future. The exemption will not be made out if an agency's impairment goes no further than showing potential communicators of the information may be less candid than they would otherwise have been.¹⁵
28. Document 1 is a table that contains a summary of all data collected from Agency officers. Document 2 contains verbatim responses of participating staff members, which contains opinions on a range of workplace topics, including sensitive matters.
29. Just as in *Johnson*,¹⁶ where the trust and credibility reposed in those who conducted a survey would likely have been undermined by the release of survey information, so too would the credibility of the Agency and the representations it made as to confidentiality be undermined by the release of Agency staff survey responses.
30. Finally, noting the above potential for identification or reidentification of individual survey participants, it is also the case that some Agency employees can be identified from their position where detailed in a survey response.
31. In regard to Document 1, I consider the information in the document is not exempt under section 35(1)(b), as this information is a data summary of the survey that does not disclose individual responses to the survey, but provides unidentifiable information in regard to a number of human resource factors in the workplace. I consider this information, if disclosed, would not impair the Agency from obtaining similar information in the future.
32. In relation to Document 2, I acknowledge there is a value in an agency publishing the results of an employee survey while also ensuring participants cannot be identified or reidentified. However, in the circumstances of this matter, while the document does not explicitly identify any individual, I am satisfied there is a reasonable possibility participants and other persons could be identified or reidentified by a person who has or would be reasonably likely to have sufficient knowledge of the Agency's workforce.
33. Further, the need to ensure candour and honesty in the provision of survey responses in a workplace survey is critical to identifying workplace issues and informing initiatives to drive organisational change and improve staff wellbeing.

¹⁴ Section 33(2C)(b).¹⁵ *Smeaton v Victorian WorkCover Authority* [2012] VCAT 1549 at [69], approving *Birnbauer v Inner and Eastern Health Care Network*

¹⁵ *Smeaton v Victorian WorkCover Authority* [2012] VCAT 1549 at [69], approving *Birnbauer v Inner and Eastern Health Care Network* [1999] 16 VAR 9.

¹⁶ *Johnson v Cancer Council of Victoria* [2016] VCAT 1596.

34. I am therefore satisfied the disclosure of Document 2 would be contrary to the public interest, as to do so would likely inhibit the willingness of Agency staff to participate in similar surveys in the future.
35. Accordingly, I am satisfied information detailing individual responses to the survey as detailed in Document 2 is exempt from release under section 35(1)(b).
36. The Document Schedule in **Annexure 1** sets out my decision in relation to each document.

Section 25 – Deletion of exempt or irrelevant information

37. 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.
38. Determining what is ‘practicable’ requires consideration of the effort and editing involved in making the deletions ‘from a resources point of view’¹⁷ 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 25.¹⁸
39. I have considered the effect of deleting exempt information from Document 2. In my view, it is not practicable for the Agency to delete the exempt information, because deleting the exempt information would render the documents meaningless.

Conclusion

40. On the information before me, I am not satisfied Document 1 is exempt from release under sections 33(1) and 35(1)(b).
41. As I am satisfied it is not practicable to provide the Applicant with an edited copy of Document 2 with exempt information deleted in accordance with section 25, access to this document is refused in full under sections 33(1) and 35(1)(b).

Review rights

42. If either party to this review is not satisfied with my decision, they are entitled to apply to the Victorian Civil and Administrative Tribunal (**VCAT**) for it to be reviewed.¹⁹
43. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.²⁰
44. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.²¹
45. 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.
46. 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.²²

¹⁷ *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].

¹⁸ *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].

¹⁹ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

²⁰ Section 52(5).

²¹ Section 52(9).

²² Sections 50(3F) and 50(3FA).

Third party review rights

47. As I have determined to release Document 1 that the Agency exempted in full under sections 33(1) and 35(1)(b), if practicable, I am required to notify the relevant persons of their right to seek review by VCAT of my decision within 60 days from the date they are given notice.²³
48. In this case, I am satisfied it is not practicable to notify the relevant persons of their third party review rights as I am of the view that notifying the relevant third parties would be an unnecessary intrusion given the sensitive context in which the information was recorded and given certain third parties are reasonably likely to object to the release of the information to the Applicant.

When this decision takes effect

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

²³ Sections 49P(5), 50(3), 50(3AB) and 52(3).

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
1.	25 October 2021 to 12 November 2021	Survey Results	3	Refused in full Sections 33(1), 35(1)(b)	Release in full Sections 33(1), 35(1)(b)	<p>Section 33(1): I am not satisfied it would be unreasonable to disclose the personal affairs information in this document for the reasons outlined in the Notice of Decision, above.</p> <p>Section 35(1)(b): I am not satisfied the information in the document would impair the ability of the Agency to obtain similar information in the future. Accordingly, section 35(1)(b) does not apply to this document.</p>
2.	25 October 2021 to 12 November 2021	Verbatim responses	26	Refused in full Sections 33(1), 35(1)(b)	Refuse in full Sections 33(1), 35(1)(b)	<p>Section 33(1): I am satisfied it would be unreasonable to disclose the personal affairs information in this document for the reasons outlined in the Notice of Decision, above.</p> <p>Section 35(1)(b): I am satisfied the information detailing individual responses to the survey is exempt from release under section 35(1)(b) as it was obtained in confidence from participants within the Agency and its release would impair the ability of the Agency to obtain similar information in the future.</p> <p>Section 25: I am not satisfied it is practicable to provide the Applicant with an edited copy of this document with exempt information deleted in accordance with section 25.</p>