

Notice of Decision and Reasons for Decision

Applicant:	'FP7'
Agency:	Boort District Health
Decision date:	17 May 2024
Exemptions considered:	Sections 33(1), 35(1)(b)
Citation:	'FP7' and Boort District Health (Freedom of Information) [2024] VICmr 29 (17 May 2024)

FREEDOM OF INFORMATION – workplace complaint – identity of a complainant – request for a copy of a complaint about the Applicant – unreasonable disclosure of personal affairs information – information communicated in confidence

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 is the same as the Agency's decision because I am satisfied the requested document is exempt in full under sections 33(1) and 35(1)(b).

Please refer to page 6 for information about review rights through the Victorian Civil and Administrative Tribunal (**VCAT**).

My reasons for decision follow.

Penny Eastman
Acting Public Access Deputy Commissioner

17 May 2024

Reasons for Decision

Background to review

1. The Applicant requested the following document:

The document [concerns an allegation] of [redacted], it is in the form of an email. The date is approximately [date]. I request the document in its entirety. I am requesting the name of the person that made the allegation. The document is with [named person and contact details].

2. The Agency identified one document and refused access to the document 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 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 relevant 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) – Document affecting personal privacy

9. A document is exempt under section 33(1) if two requirements are satisfied:
 - (a) the document contains or reveals 'information relating to the personal affairs of any person' (**personal affairs information**); and
 - (b) disclosure of the personal affairs information would be unreasonable in the circumstances.

First requirement – does the document contain or reveal personal affairs information?

10. Information relating to a person's 'personal affairs' includes information that identifies any person, discloses their address or location, or any information from which their identity, address or location may be reasonably determined.¹
11. The concept of personal affairs information is broad, such that information will relate to the personal affairs of a person if it 'concerns or affects that person as an individual'.² It includes information relating to health, private behaviour, home life, or personal or family relationships of individuals.³
12. Personal affairs information can be revealed or indirectly disclosed by connecting or linking the information in the disclosed document with other information available to an applicant.⁴
13. The document is an internal workplace complaint made by a person other than the Applicant (the **complainant**). I am satisfied that the document reveals the identity of the complainant and other people (**third parties**). I am also satisfied that the identity of the complainant and other third parties could be inferred from the content of the document, and information that is likely known to the Applicant, even if direct identifiable information were removed from the document, such as names and contact details.

Second requirement – would disclosure of the personal affairs information be unreasonable in the circumstances?

14. The concept of 'unreasonable disclosure' involves balancing the public interest in the disclosure of official information with the personal interest in privacy in the particular circumstances of a matter.
15. I must carefully weigh the facts and matters that 'relevantly, logically, and probatively' bear upon whether disclosure of the personal affairs information is unreasonable in the circumstances.⁵
16. The following factors are relevant in determining whether disclosure of the personal affairs information would be unreasonable in the circumstances:
 - (a) the nature of the personal affairs information;
 - (b) the circumstances in which the information was obtained;
 - (c) the Applicant's interest in the information;
 - (d) whether any public interest would be promoted by release of the personal affairs information;
 - (e) the likelihood of disclosure of information, if released;

¹ Section 33(9).

² *Hanson v Department of Education & Training* [2007] VCAT 123 at [9].

³ *Re F and Health Department* (1988) 2 VAR 458, quoted in *RFJ v Victoria Police FOI Division* [2013] VCAT 1267 [103] and [109].

⁴ *Harrison v Victoria Police* [2022] VCAT 280 at [153].

⁵ [2008] VSCA 218 at [98].

- (f) whether the individuals to whom the information relates object, or would be likely to object, to the release of the information; and
 - (g) whether disclosure of the information would or would be reasonably likely to endanger the life or physical safety of any person.⁶
17. I note the Applicant's reasons for seeking access to the document and the impact that the complaint has had on them.
18. I also note that there is no information before me to suggest that disclosing the document would endanger the life or physical safety of any person.
19. However, after careful consideration, I am satisfied that providing access to a copy of the complaint would involve an unreasonable disclosure of the personal affairs information in the circumstances for the following reasons:
- (a) It can be inferred that the complaint was made with an expectation that the identity of the complainant would remain confidential. The complainant would not expect that a copy of their complaint would be provided to the person they complained about, outside of the Agency's internal investigation and management of their complaint.
 - (b) There is a public interest in ensuring that people are uninhibited from making complaints to their employer, so that any concerns are appropriately investigated and managed by their employer. It is likely that disclosing complaints under FOI processes, separate from an internal investigation process, would inhibit people from making complaints in future out of concern their identity could be revealed to the [the person being complained about]. If complaints of this nature were disclosed under the FOI process, it is reasonably likely that serious workplace concerns would not be appropriately investigated or managed, which may have flow on effects to the health and safety of staff and clients of the Agency.
 - (c) The Applicant's interest in the document is personal, and disclosure would not promote an interest shared by the public.
 - (d) Disclosure under the FOI process is unconditional, and the document contains highly sensitive information about a third party. I consider the third party's privacy outweighs the Applicant's personal interest in the document in this instance.
 - (e) It is reasonably likely that all third parties referred to in the complaint would object to the document being disclosed to the Applicant.
20. Therefore, I am satisfied that the document is exempt from release under section 33(1).

Section 35(1)(b) – Documents containing material obtained in confidence

21. A document is exempt under section 35(1)(b) if two requirements are satisfied:
- (a) disclosure would divulge information or matter:

⁶ Section 33(2A).

- (i) communicated in confidence;
 - (ii) 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 by reason that the disclosure would be reasonably likely to impair the ability of an agency or a Minister to obtain similar information in the future.

First requirement – would disclosing the document divulge information or matter that was communicated in confidence to the Agency?

22. Whether information was communicated in confidence is a question of fact,⁷ determined from the perspective of the communicator.⁸
23. Confidentiality can be express or implied from the circumstances.⁹
24. Generally, section 35(1) only applies to information communicated from an external source. It usually does not apply to information generated by the agency or its own officers. However, in very limited circumstances, section 35 may apply to particularly sensitive and confidential information communicated to an agency by its own officers.¹⁰ For example, in the context of internal complaints and investigations, or where misconduct or corruption is reported. In these situations, the officer's position is analogous to that of an outside source.¹¹
25. The document requested by the Applicant is an internal workplace complaint about the Applicant. I am satisfied that the complainant's position is analogous to an outside source and that confidentiality can be implied due to the sensitive nature of the information that they communicated to the Agency.

Second requirement – would disclosure reasonably likely impair the ability of the Agency to obtain similar information in future?

26. For information communicated in confidence to be exempt under section 35(1)(b), its disclosure must be reasonably likely to impair the Agency's ability to obtain similar information in the future.
27. It is not sufficient to merely establish that people would be less candid in future or would feel betrayed or feel resentment if the information were disclosed.¹² There must be an actual impairment to the ability of the agency to obtain like information in the future.¹³
28. For the same reasons set out in paragraph 19(b) above, I am satisfied that disclosing the document would inhibit the Agency from obtaining similar information in future.

⁷ *Ryder v Booth* [1985] VR 869, 883.

⁸ *Woodford v Ombudsman* [2001] VCAT 721, [95]; *XYZ v Victoria Police* [2010] VCAT 255 at [265]; *Barling v Medical Board of Victoria* (1992) 5 VAR 542, 561-562.

⁹ *Ryder v Booth* [1985] VR 869, 883; *XYZ v Victoria Police* [2010] VCAT 255 at [265].

¹⁰ *Sportsbet v Department of Justice* [2010] VCAT 8 at [77]-[78], referring to *Birnbauer v Inner & Eastern Health Care Network* (1999) 16 VAR 9, 17.

¹¹ *Sportsbet v Department of Justice* [2010] VCAT 8 at [77].

¹² *Ryder v Booth* [1985] VR 869, referred to in *Mees v University of Melbourne* [2009] VCAT 782 at [54].

¹³ *Birnbauer & Davies v Inner & Eastern Health Care Network* [1999] VCAT 1363 at [68].

29. As such, the document is exempt from release under section 35(1)(b).

Section 25 – Deletion of exempt or irrelevant information

30. 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.
31. Deciding whether it is ‘practicable’ to delete exempt or irrelevant information requires consideration of:
- (a) the effort involved in making the deletions from a resources point of view;¹⁴ and
 - (b) the effectiveness of those deletions – that is, whether the edited document still has meaning.¹⁵
32. The Applicant specified in their FOI request that they do not agree to received edited documents. In any case, I am satisfied that it is not practicable to provide the Applicant with edited copy the document as the required redactions would render the document meaningless.

Conclusion

33. On the information before me, I am satisfied the document is exempt from release under sections 33(1) and 35(1)(b) in full. Accordingly, access to the document is refused.

Timeframe to seek a review of my decision

34. If the Applicant is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.¹⁶
35. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹⁷
36. 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.
37. 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.¹⁸

¹⁴ *Mickelborough v Victoria Police* [2009] VCAT 2786 at [31]; *The Herald and Weekly Times Pty Limited v The Office of the Premier (General)* [2012] VCAT 967 at [82].

¹⁵ *Honeywood v Department of Human Services* [2006] VCAT 2048, [26]; *RFJ v Victoria Police FOI Division (Review and Regulation)* [2013] VCAT 1267, [140], [155]; *Re Hutchinson and Department of Human Services* (1997) 12 VAR 422

¹⁶ Section 50(1)(b).

¹⁷ Section 52(5).

¹⁸ Section 50(3FA).