

## Notice of Decision and Reasons for Decision

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Applicant:	'FN1'
Agency:	Wyndham City Council
Decision date:	10 January 2024
Sections considered:	Section 33(1)
Citation	'FN1' and Wyndham City Council (Freedom of Information) [2024] VICmr 5 (10 January 2024)

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FREEDOM OF INFORMATION – local government – council – vehicle tracking reports – name of officer who accessed records – personal affairs information – agency officers – disclosure unreasonable in the circumstances

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.

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

As I am satisfied it remains practicable to provide the Applicant with an edited copy of the document with exempt information deleted in accordance with section 25, I have determined to grant access to the document in part.

My reasons for decision follow.

Please refer to page 8 for information about further review rights through the Victorian Civil and Administrative Tribunal.

Shantelle Ryan  
**Acting Public Access Deputy Commissioner**

10 January 2024

## Reasons for Decision

### Background to review

1. The Applicant made a request to the Agency seeking access to the following documents:
  1. All job safety analysis and daily work sheets completed and submitted by [name of Applicant] between the dates [date] and [date].
  2. Information pertaining to all dates that the GPS Activity Data/vehicle tracking reports were accessed/downloaded from [website] for council vehicle registration number [registration number] including, but not limited to: the dates and times the data was accessed, the name of the party accessing the data, the date ranges of data downloaded/accessed for the period of [date] to [date].
2. On [date], the Agency made a decision on point one of the Applicant's request, advising in its decision letter that no documents were identified in response to point two.
3. Following clarification between the Agency and the Applicant, the Agency identified one further document and decided to process point two of the Applicant's request as a new FOI application.
4. The Agency identified one document, comprising of 102 pages, falling within the terms of point one of the Applicant's request and refused access in part under section 33(1). The Agency's decision letter sets out the reasons for its decision.

### Review application

5. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
6. The Applicant advised the scope of review is limited to agency officer names. Accordingly, this review relates to one document to which the Agency granted access in part.
7. I have examined a copy of the document subject to review.
8. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
9. I have considered all communications and submissions received from the parties.
10. 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.
11. 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) – Documents affecting personal privacy of third parties*

12. 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’.

*Does the document contain personal affairs information of individuals other than the Applicant?*

13. Information relating to a person’s ‘personal affairs’ includes information that identifies any person, or discloses their address or location. It also includes any information from which this may be reasonably determined.<sup>2</sup>
14. 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>
15. Even where an applicant claims to know the identity of a third party, disclosure of their personal affairs information may still be unreasonable in the circumstances.<sup>4</sup>
16. I have also considered the following principles in determining whether information is personal affairs information:
- (a) ‘personal information’ has been given a wide interpretation;
  - (b) Information that ‘concerns or affects’ the person as an individual is personal information;
  - (c) A person’s personal opinion of another person, or the conduct, may be ‘personal information’ regarding the opinion holder; and
  - (d) Information that is ‘fairly benign’ will not deprive the information of its personal character.

17. The Applicant submits:

The information sought as to who accessed the GPS data of the council vehicle [redacted] would have been obtained by an employee/s in their professional capacity and therefore is not

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<sup>1</sup> Sections 33(1) and 33(2).

<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> *AB v Department of Education and Early Childhood Development* [2011] VCAT 1263 at [58]; *Akers v Victoria Police* [2003] VCAT 397 at [41].

considered personal information or the 'personal affairs' of a third party. The information is procedural and administrative in nature.

18. I consider the FOI Act does not exclude identifying personal information of agency officers, and I note the Act has not been interpreted in such a way. Rather, I accept that a document discloses personal affairs information if the applicant or any member of the public could directly or indirectly identify an individual from the personal affairs information.<sup>5</sup>
19. Accordingly, I am satisfied the information the Applicant seeks amounts to personal information and I must consider whether its disclosure would be unreasonable.

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

20. 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.
21. In *Victoria Police v Marke*,<sup>6</sup> 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'.<sup>7</sup> 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'.<sup>8</sup>
22. 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 the information was obtained

The personal affairs information in the document includes names, log ID, user ID and IP addresses of agency officers and was obtained by the Agency in the course of its officers carrying out their regular functions.

Generally, I consider it would not be unreasonable to disclose the names of agency officers, where a document sought is an official document of the agency and records agency staff carrying out their usual employment duties and responsibilities within a professional context.

I also acknowledge the importance of transparency and accountability in relation to accessing [Agency] records [redacted].

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<sup>5</sup> *O'Sullivan v Department of Health & Community Services (No 2)* (1995) 9 VAR 1 at 14; *Beauchamp v Department of Education* [2006] VCAT 1653 at [42].

<sup>6</sup> [2008] VSCA 218 at [76].

<sup>7</sup> *Ibid.*

<sup>8</sup> *Ibid* at [79].

However, determining whether it is unreasonable to release information depends on the circumstances of the particular request.

I consider disclosure may be unreasonable if the agency officers are not senior officials and decision makers. I accept the more senior their role, the greater their level of accountability for decisions, and the more likely their details are in the public domain. However, based on the information before me, it appears the Agency Officers are not senior officials, were not involved in decision-making and accordingly, their details are not publicly available.

(b) 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).<sup>9</sup>

In their review application, the Applicant states:

The names are being sought as part of an ongoing matter with [an oversight body].

... [redacted contextual information]

I understand the Applicant [may have knowledge of the names of certain staff members], however in the circumstances, I am not satisfied FOI is the appropriate mechanism to obtain the requested information. I do not consider the information before me calls for greater scrutiny in circumstances where there are other agencies investigating the issues and would be able to access such information if needed.

I also note the Agency disclosed all substantive information in the document, except for limited personal affairs information.

I acknowledge the Applicant's interest in seeking the release of the personal affairs information in the document. However, this factor must be weighed against other relevant factors in an attempt to reconcile two important, but competing, objectives: the public interest in disclosure of information and the interest in protecting a third party's personal privacy.

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

Having reviewed the document, I note the Agency disclosed all substantive information to the Applicant, except for certain personal affairs information.

The Applicant did not provide information to support any public interest that would be promoted by the release of the personal affairs information in the document. Rather, I consider the Applicant's interest in obtaining this information relates to their own interest only.

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<sup>9</sup> *Victoria Police v Marke* [2008] VSCA 218 at [104].

## OFFICIAL

Accordingly, I do not consider a public interest would be promoted by the release of the personal affairs information contained in the document.

(d) The likelihood of disclosure of information, if released.

As the FOI Act does not place any restrictions on an applicant's use or dissemination of documents obtained under FOI, this is to be interpreted by reference to the capacity of any member of the public to identify a third party.<sup>10</sup>

Accordingly, I have considered the likelihood of the personal affairs information in the document being further disseminated, if disclosed, and the effects broader disclosure of this information would have on the privacy of the relevant third parties.

I acknowledge the Applicant seeks the information as part of an ongoing matter with [an oversight body] and I consider it is reasonably likely they would disseminate the personal affairs information in the document if the relevant information were released under the FOI Act.

(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, if practicable, an agency must notify that person (or their next of kin, if deceased) 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.<sup>11</sup>

The Agency's decision letter, dated [date], states:

I am satisfied that the disclosure of the personal information of third parties would be unreasonable considering various factors, including but not limited to:

- the outcome of consultation with third parties;
- it is not practicable to consult with certain third parties;
- the relevant third parties not consulted with would likely object to the disclosure of their personal affairs information;

The Agency advised it consulted with relevant third parties in relation to the release of their personal affairs information. I acknowledge three parties objected to the release and another third party could not be contacted.

I have taken the views, and likely view, of the third parties and their right to personal privacy into consideration.

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<sup>10</sup> Ibid at [68].

<sup>11</sup> Section 33(2B).

- (f) Whether disclosure of the information would or would be reasonably likely to endanger the life or physical safety of any person<sup>12</sup>

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.<sup>13</sup>

The Applicant asserts:

Disclosure does not endanger the life or physical safety of another person.

Whilst I acknowledge the Applicant's view that disclosure would not endanger the life or physical safety of another person, I consider that disclosure of information, in the circumstances, may cause those persons undue stress and anxiety, even if that is not the Applicant's intention.

23. While I consider there are factors both in favour of, and against disclosure, having weighed up the above factors, I am satisfied disclosure of the personal affairs information exempted by the Agency in the document would be unreasonable in the circumstances.
24. The information identified by the Agency is therefore exempt under section 33(1).

#### ***Section 25 – Deletion of exempt or irrelevant information***

25. 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.
26. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'<sup>14</sup> 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.<sup>15</sup>
27. Given my decision is the same as the Agency's decision and it granted access to the documents in part in accordance with section 25, I consider it remains practicable to provide the Applicant with an edited copy of the document with exempt information deleted.

#### **Conclusion**

28. On the information before me, I am satisfied the information identified by the Agency in the document is exempt from release under section 33(1).

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<sup>12</sup> Section 33(2A).

<sup>13</sup> Section 33(2A).

<sup>14</sup> *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].

<sup>15</sup> *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], [155].

## OFFICIAL

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

### Timeframe to seek a review of my decision

30. 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.<sup>16</sup>
31. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.<sup>17</sup>
32. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.<sup>18</sup>
33. 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.
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.<sup>19</sup>

### When this decision takes effect

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

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<sup>16</sup> The Applicant in section 50(1)(b) and the Agency in section 50(3D).

<sup>17</sup> Section 52(5).

<sup>18</sup> Section 52(9).

<sup>19</sup> Sections 50(3F) and 50(3FA).