

Notice of Decision and Reasons for Decision

Applicant:	'DK9'
Agency:	Monash University
Decision date:	30 July 2021
Provisions and exemptions considered:	Section 25A(5) in conjunction with sections 33(1) and 34(4)(a)(ii)
Citation:	'DK9' and Monash University (Freedom of Information) [2021] VICmr 226 (30 July 2021)

FREEDOM OF INFORMATION – workplace records – executive salary information – non-executive salary – income

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 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 FOI request differs from the Agency's decision.

I am not satisfied it is apparent from the nature of the documents, as described in the Applicant's FOI request, that the document to which the request relates would be exempt in full under sections 33(1) or 34(4)(a)(ii).

The effect of my decision is the Agency is required to process the Applicant's request in accordance with the FOI Act.

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner
30 July 2021

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency seeking access to documents held by the Agency.
2. Following consultation between the Agency and the Applicant, the Applicant clarified the terms of their request as follows:

Across all employment positions in the university, I am seeking the top 50 total compensation/income values across all payment types (including bonuses and the like) for each of the 2018-19 and 2019-2020 financial years.
3. During consultation with the Agency, the Applicant advised:

...I don't want names or any identifiers. Just the numerical values indicating total gross income for the top 50 incomes in each financial year.
4. Without having identified any, or all documents, the Agency refused access to documents in accordance with the Applicant's request under section 25A(5).
5. In its decision, the Agency advised documents falling within the terms of the Applicant's request, should any exist, would be exempt from release under sections 33(1) and 34(4)(a)(ii).
6. The Agency's decision letter sets out the reasons for its decision.

Review

7. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
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. In making its submission, the Agency indicated its submission was confidential. While I acknowledge the Agency's view, in order to provide the Applicant with adequate reasons, it has been necessary for me to summarise and convey certain factors upon which the Agency relies to refuse access to the requested document.
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

12. Section 25A(5) provides an agency may refuse to grant access to documents in accordance with an FOI request:

- (a) if it is apparent from the nature of the request all documents sought would be exempt under the FOI Act; and
 - (b) where it is not possible to provide the applicant with an edited copy of the documents with exempt information deleted, or it is clear the applicant does not seek an edited copy of the documents.
13. Importantly, an agency is not required to identify any or all documents relevant to a request or to specify any relevant exemption under which a particular document would be exempt.
14. The power under section 25A(5) is carefully circumscribed.¹ A decision maker must be satisfied the following three requirements are met, which operate to limit the application of section 25A(5):
- (a) The exempt nature of the documents must be objectively apparent from the face of the request. Namely, the terms of the request, as described by the applicant. The ‘nature’ of a document refers to its inherent or essential quality or character.
 - (b) It must be apparent all requested documents are exempt.
 - (c) It must be apparent from:
 - (i) the nature of the documents, as described in the request, no obligation would arise for the agency to grant access to an edited copy of a document in accordance with section 25; or
 - (ii) the request, or through consultation with the applicant, they would not wish to have access to an edited copy of the document.²

Is the nature of the requested documents objectively apparent from the face of the request?

15. The Applicant seeks the ‘top 50 total compensation/income values across all payment types (including bonuses and the like) for each of the 2018-19 and 2019-2020 financial years’.
16. I consider the Applicant seeks access to 100 discrete values that would be reasonably held by the Agency. Although, I accept this information may not necessarily exist in a discrete document.
17. In such circumstances, section 19 provides:
- (1) Where—
 - (a) a request is duly made to an agency;
 - (b) it appears from the request that the desire of the applicant is for information that is not available in discrete form in documents of the agency; and
 - (c) the agency could produce a written document containing the information in discrete form by—
 - (i) the use of a computer or other equipment that is ordinarily available to the agency for retrieving or collating stored information; or
 - (ii) the making of a transcript from a sound recording held in the agency—

¹ *Knight v Corrections Victoria* [2010] VSC 338 at [37].

² *Knight v Corrections Victoria* [2010] VSC 338.

the agency shall deal with the request as if it were a request for access to a written document so produced and containing that information and, for that purpose, this Act applies as if the agency had such a document in its possession.

18. Having reviewed the terms of the Applicant's FOI request, I am satisfied the nature of the requested document (or documents) is objectively apparent from the face of the request and such a document or documents could be produced by the Agency in accordance with section 19. As such, I am satisfied the first requirement of section 25A(5) is met.

Would all documents, as described in the request, be exempt?

19. In refusing access to the requested documents under section 25A(5), the Agency determined, should any exist, they would be exempt under sections 33(1) and 34(4)(a)(ii).

Section 33(1) – documents affecting personal privacy

20. 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;³ and
 - (b) such disclosure would be 'unreasonable'.
21. 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 such information may be reasonably determined.⁴
22. The concept of 'unreasonable disclosure' involves balancing the public interest in the disclosure of official information with the personal interest in privacy in the circumstances of a matter.
23. 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 disclosure of the information would, or would be reasonably likely to, endanger the life or physical safety of any person.⁵ However, I do not consider this to be a relevant factor in the circumstances.
24. In summary, the Agency submits:
- (a) The information sought is confidential and not publicly available.
 - (b) While the Applicant does not seek access to Agency officer names, even without this information, it would be possible to identify individuals from the information, for example senior Agency officers.
 - (c) The information is provided to the Australian Tax Office.
 - (d) The individuals concerned would object to disclosure of their information.
 - (e) Certain information about salaries paid by the Agency is published in its annual report.
 - (f) The requested information is relevant to current salary negotiations.

³ Sections 33(1) and (2).

⁴ Section 33(9).

⁵ Section 33(2A).

Would the requested document contain personal affairs information?

25. I am satisfied certain information in a document produced by the Agency in accordance with section 25 would contain personal affairs information where it relates to senior Agency officers whose identity could be reasonably ascertained based on the salary paid and seniority of the role.
26. However, I am not satisfied all information in such a document, being the 50 highest compensation amounts would necessarily identify each of the relevant individuals.
27. Therefore, I am not satisfied all information that would fall within the terms of the Applicant's request would constitute 'personal affairs information' for the purposes of section 33.

Would disclosure of the personal affairs information be unreasonable?

28. I have considered the following factors in determining whether disclosure of personal affairs information would be unreasonable in this matter:
 - (a) the nature of the personal affairs information and the circumstances in which the information was obtained;
 - (b) the Applicant's interest in the information, and whether their purpose for seeking the information is likely to be achieved through its disclosure;
 - (c) the likelihood of further disclosure of the information, if released to the Applicant;
 - (d) whether any public interest would be promoted by release of the information;
 - (e) whether the individuals to whom the information relates object, or would be likely to object, to the release of the information; and
 - (f) whether the disclosure of information would, or would be reasonably likely to, endanger the life or physical safety of any person.⁶
29. In relation to those compensation amounts relating to the most senior Agency officers, based on the information before me, I do not consider disclosure of this information would be unreasonable, for the following reasons:
 - (a) The fact certain salary information for public sector employees is published (though not that sought by the Applicant) demonstrates the need for transparency and public scrutiny relating to the expenditure of public funds, including in relation to the salary of public sector employees.
 - (b) The disclosure of such personal affairs information is generally not unreasonable in relation to senior public sector roles.⁷
 - (c) The public interest weighs in favour of disclosure of information regarding the way public funds are expended in the interests of transparency and public scrutiny.
 - (d) I note the Agency's view the affected Agency officers would be likely object to disclosure of their personal affairs information. However, while such a factor would be a relevant

⁶ Section 33(2A).

⁷ *Ricketson v Royal Women's Hospital* (1989) 4 VAR 10

consideration, it would not be a determinative factor and would need to be considered in the circumstances of each individual.⁸

30. Accordingly, I am not satisfied all information in a document sought by the Applicant would be exempt under section 33(1).

Section 34(4)(a)(ii)

31. Section 34(4)(a)(ii) provides a document is an exempt document if it contains, 'in the case of an agency engaged in trade or commerce, information of a business, commercial or financial nature that would if disclosed under this Act be likely to expose the agency unreasonably to disadvantage'.
32. The Victorian Civil and Administrative Tribunal (**VCAT**) has held 'the terms 'trade' and 'commerce' are not words of art; rather they are expressions of fact and terms of common knowledge'.⁹ VCAT has adopted the view of the Federal Court of Australia that these terms are 'of the widest import'.¹⁰
33. Section 34(4)(a)(ii) contemplates that disclosure of a document under the FOI Act may expose an agency to a certain measure of disadvantage, and that any such exposure must be unreasonable in the circumstances.
34. The Agency submits in part:
- (a) It is engaged in trade or commerce in its provision of education and research in exchange for the payment of fees, and in its employment of staff who are subject to enterprise agreements.
 - (b) The salary information is current.
 - (c) If released, the information may be broadly disclosed which would expose the Agency to substantial commercial detriment.
 - (d) In *Chopra v Department of Education and Training*¹¹ (**Chopra decision**) VCAT accepted submissions made by the Department of Education and Training as to why disclosure of invoices issued by a law firm would be likely to expose that department unreasonably to disadvantage.
 - (e) Sourcing senior executive talent for academic and research is highly competitive.
 - (f) Disclosure would undermine the Agency's negotiating position in relation to salary negotiations with senior officers.
 - (g) Disclosure would give a misleading impression of salaries paid by the Agency, which could lead to disputes.
 - (h) Disclosure would weaken the Agency's position in relation to the recruitment of senior officers.

⁸ *Marke v Victoria Police* (2007) 28 VAR 84; [2007] VSC 522 at [45],

⁹ *Pallas v Roads Corporation (Review and Regulation)* [2013] VCAT 1967 at [33].

¹⁰ *Pallas v Roads Corporation (Review and Regulation)* [2013] VCAT 1967 at [34]; *Re Ku-Ring-Gai Co-operative Building Society (No 12) Ltd* (1978) 22 ALR 621 at [649].

¹¹ [2019] VCAT 1860.

Is the Agency engaged in trade or commerce?

35. In my decision '*BH7' and Monash University (Freedom of Information)*¹² I accepted the Agency is engaged in trade or commerce. In that decision I relied on section 5(i) of the *Monash University Act 2009* (Vic), for the Agency 'to utilise or exploit its expertise and resources, whether commercially or otherwise' and the nature of the document subject to review, which was a contract between the Agency and an international corporation.
36. However, in this instance, I am not satisfied the Agency is engaged in trade or commerce for the purposes of section 34(4)(a)(ii). In my view, the payment of salaries is common among all public sector agencies and to consider such payments as evidence of an agency being engaged in trade or commerce would remove any meaningful distinction between a public sector agency engaging in the provision of a public service (namely higher education), or trade or commerce in a commercially competitive environment.
37. Despite the fact I am not persuaded the Agency is engaged in trade or commerce for the purposes of section 34(4)(a)(ii), I have also considered the Agency's submission in relation to the remaining requirements under section 34(4)(a)(ii).

Would the document contain information of a business, commercial or financial nature?

38. The document would contain the salary information of 50 Agency officers. I am satisfied this information constitutes financial information for the purposes of section 34(4)(a)(ii).

Would disclosure of the document be likely to expose the Agency unreasonably to disadvantage?

39. On the information before me, I am not satisfied disclosure of salary information would be likely to expose the Agency unreasonably to disadvantage for the following reasons:
- (a) I do not agree disclosure of the salary information would be misleading as the terms of the request are clear. If any misunderstanding were to arise, it would be open to the Agency to provide additional information to the Applicant to assist them to understand the information provided.
 - (b) All public sector agencies seek to recruit talented and skilled staff. I am not persuaded the Agency is markedly different in this respect, or that it has demonstrated disclosure of the salary information would make it more difficult to recruit to senior officers to Agency positions.
 - (c) In the Chopra decision, VCAT did not form a view on the impact that disclosure would have on the competitive position of the Department of Education and Training, rather it determined that other factors, which were unique to that matter, would expose the Department unreasonably to disadvantage.¹³
 - (d) In my view, even if disclosure of the salary information would expose the Agency to a certain measure of disadvantage, I am not satisfied any such exposure would be unreasonable in the circumstances. Rather, for the reasons set out above, I am satisfied the public interest weighs in favour of disclosure in this instance.

¹² [2020] VICmr 76 (20 March 2020).

¹³ *Chopra v Department of Education and Training* [2020] VICmr 76 (20 March 2020) at [50].

40. Accordingly, I am not satisfied all information in a document sought by the Applicant would be exempt under section 34(4)(a)(ii). As such, the second requirement of section 25A(5) is met.

Section 25 – Is there scope to provide an edited copy of the requested document?

41. 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.
42. Determining what is ‘practicable’ requires consideration of the effort and editing involved in making the deletions ‘from a resources point of view’¹⁴ 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 25.¹⁵
43. Given the nature of the request, and my assessment above, I am satisfied it would likely be practicable to grant access to an edited copy of one or more documents, with exempt or irrelevant information deleted in accordance with section 25. I am also satisfied it would be practicable to do so as the work involved would not require substantial time and effort, and the edited documents would retain sufficient meaning for the Applicant. As such, I am not satisfied the third requirement of section 25A(5) is met.

Conclusion

44. On the information before me, I am not satisfied it is apparent from the nature of the documents, as described in the Applicant’s FOI request, that the document to which the request relates would be exempt in full under sections 33(1) or 34(4)(a)(ii).
45. The effect of my decision is the Agency is required process the Applicant’s request in accordance with the FOI Act.

Review rights

46. If either party to this review is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.¹⁶
47. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹⁷
48. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹⁸
49. 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.
50. 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.¹⁹

¹⁴ *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].

¹⁵ *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].

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

¹⁷ Section 52(5).

¹⁸ Section 52(9).

¹⁹ Sections 50(3F) and (3FA).

When this decision takes effect

51. My decision does not take effect until the Agency's 14 day review period expires.
52. If a review application is made to VCAT, my decision will be subject to any VCAT determination.
53. If the Agency does not seek review by VCAT, once the 14 day review period expires, my expectation is that it will proceed to process the Applicant's request within the statutory timeframe, or as otherwise agreed with the Applicant.