

Notice of Decision and Reasons for Decision

Applicant:	'DX9'
Agency:	Safer Care Victoria
Decision date:	31 January 2022
Exemption considered:	Section 33(1)
Citation:	'DX9' and Safer Care Victoria (Freedom of Information) [2022] VICmr 9 (31 January 2022)

FREEDOM OF INFORMATION – public health services – COVID-19 pandemic – Clinical Leadership Expert Group – meeting attendees – meeting minutes – personal affairs information of non-executive agency officers – disclosure not unreasonable

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.

I am not satisfied certain information in Document 1 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 information deleted in accordance with section 25, access to the document is granted in part.

The Schedule of Documents in **Annexure 1** sets out my decision in relation to the document.

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner

31 January 2022

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency seeking access to the following documents:
 - a) A list of names of members of Safer Care Victoria's Clinical Leadership Expert Group from [date] to the date of this request,
 - b) The minutes of all meetings of the Clinical Leadership Expert Group from [date] to the date of this request, and
 - c) A copy of all modelling undertaken by the Clinical Leadership Expert Group or its subgroups pertaining to the spread of COVID-19 in Victoria and the impact to health services, cancer screening rates, and other adverse impacts that would arise from the COVID-19 pandemic in Victoria from [date] to the date of this request...
2. The Agency identified two documents falling within the terms of their request and granted access to each of the documents in part, relying on section 33(1) to refuse access to certain information.

Review application

3. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access to the documents in part.
4. During the review, the Applicant advised OVIC they seek review of the Agency's decision to exempt the details of members of the Agency's COVID-19 Clinical Leadership Expert Group (**Expert Group**) listed in Document 1 only.
5. Therefore, my review relates to the personal affairs information to which the Agency denied access in Document 1.
6. I have examined copy of the document subject to review.
7. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
8. I have considered all communications and submissions received from the parties.
9. 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.
10. 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.

The Agency

11. In summary, the Agency's responsibilities include:
 - (a) '[a]nalysing health service data and other information to flag emerging trends and patient risks';
 - (b) '[a]lerting health services to system and safety issues;

- (c) '[w]orking with clinicians and consumers to develop best practice clinical guidance and resources';
- (d) '[p]romoting best practice improvement methods'; and
- (e) '[l]eading consumer engagement and participation in healthcare'.¹

12. The Agency's website provides the following information regarding the Expert Group:²

Our clinical networks enabled us to swiftly establish a central Clinical Leaders Expert Group that brings together more than 130 representatives of craft groups from across the state to provide advice and guidance, resolve issues and share up-to-date information that is suitable for our context in this fast-changing environment.

13. As noted above, the Applicant seeks access to the details of the Expert Group members listed in the document. From their titles, positions and role on the Expert Group, the members whose personal affairs information was exempted from release by the Agency, appear to be senior clinical practitioners and administrators who represent various Victorian public health sector organisations on the Expert Group.

Section 33(1) – Documents affecting personal privacy

14. 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 the information relating to the 'personal affairs' of a person other than the Applicant (a **third party**);³ and
- (b) such disclosure would be 'unreasonable'.

Does the document contain personal affairs information of a third party?

- 15. 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
- 16. A document will disclose personal affairs information if it is capable, either directly or indirectly, of identifying a particular individual whose personal affairs are disclosed. As the nature of disclosure under the FOI Act is unrestricted and unconditional this is to be interpreted by the capacity of any member of the public to potentially identify a third party.⁵
- 17. I am satisfied the information exempted from release by the Agency is personal affairs information for the purpose of section 33.

Would disclosure of the personal affairs information be unreasonable in the circumstances?

- 18. In determining whether the exemption applies, it is necessary to determine whether disclosure of the personal affairs information would be unreasonable in the circumstances. This involves balancing the public interest in the disclosure of official information with the personal interest in privacy in the particular circumstances of a matter.

¹ See Safer Care Victoria website, 'What we do' at <https://www.bettersafecare.vic.gov.au/about/about-scv/what-we-do>.

² See Safer Care Victoria website, 'Responding to COVID-19' at <https://www.bettersafecare.vic.gov.au/news-and-media/responding-to-covid-19>.

³ Sections 33(1) and 33(2).

⁴ Section 33(9).

⁵ *Hanson v Department of Education & Training* [2007] VCAT 123.

19. 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.⁶
20. The nature of disclosure of a document under the FOI Act is unconditional and unrestricted, which means an applicant is free to disseminate widely or use a document as they choose.⁷
21. I also note the decision of *Coulson v Department of Premier and Cabinet*⁸ (**Coulson decision**), in which the Victorian Civil and Administrative Tribunal (VCAT) held, whether or not an agency officer's personal affairs information is exempt under section 33(1) must be considered in the context of the particular circumstances of each matter.
22. Therefore, the proper application of section 33(1) involves the consideration of 'all matters relevant, logical and probative to the existence of conditions upon which the section is made to depend'.⁹
23. In this case, I have considered the following factors¹⁰ when determining whether disclosure of the personal affairs information would be unreasonable in the circumstances:
 - (a) the nature of the information (for example, whether it is sensitive or is of current relevance);
 - (b) the extent to which the information is publicly available;
 - (c) the circumstances in which the information was obtained;
 - (d) the Applicant's interest in the information, and whether their purpose for seeking access to the information is likely to be achieved;
 - (e) whether any public interest would be promoted by disclosure of the information;
 - (f) whether the individual to whom the information relates consents or objects to its disclosure; and
 - (g) whether disclosure of the information would, or would be reasonably likely to, endanger the life or physical safety of any person.
24. In its submission, the Agency states:

In making the decision to exempt information under section 33(1) and determining whether release of personal information would be unreasonable, all relevant circumstances were taken into consideration, including but not limited to:

- The nature of the information in question;
- The circumstances in which the department came to possess the information;
- The extent to which the information is available to the public;
- The likelihood that the information being information that the person concerned would not wish to have disclosed without consent;
- Whether the release of information would cause stress, anxiety and embarrassment; and
- The extent of and likely public disclosure of the information if the information was released to the applicant.

⁶ *AB v Department of Education and Earl Childhood Development* [2011] VCAT 1263 at [58]; *Akers v Victoria Police* [2003] VCAT 397.

⁷ *Victoria Police v Marke* [2008] VSCA 218 at [68].

⁸ (Review and Regulation) [2018] VCAT 229.

⁹ [2008] VSCA 218 at [104].

¹⁰ A number of these factors were identified in *Page v Metropolitan Transit Authority* (1988) 2 VAR 243.

In the recent case of *Coulson v Department of Premier and Cabinet*, the Tribunal reviewed some earlier cases from 2008, 2010 and 2012 and concluded as follows:

With the passage of years since those decisions and the increasing prominence of rights of privacy, in my view an approach regarding disclosure of the names of staff holding non-executive positions as unreasonable disclosure is the correct and preferable approach.

Accordingly, the department relies on the above case to claim that the names of non-executive third parties are exempt under section 33 of the Act.

Further, the department submits that the release of this staff information would not add to an understanding of the documents and would be unlikely to assist the applicant.

25. I have reviewed the personal affairs information and considered the Agency's reasons for decision and submission. I am satisfied disclosure of the personal affairs information, which lists the names of Expert Group members who attended a meeting of the group, would not be unreasonable in the circumstances for the following reasons:
- (a) Broadly, I agree that, consistent with the *Coulson* decision,¹¹ whether the personal affairs information of an agency officer or similar person is exempt under section 33(1) must be considered in the context of each matter.
 - (b) Subject to an agency demonstrating special circumstances apply, I consider it would not be unreasonable to disclose certain details of a third party, such as their name or position title, regardless of their seniority, where a document sought is an official document of an agency and merely records either a person carrying out their usual role or employment duties for or on behalf of an agency or another public sector organisation.
 - (c) I do not consider the personal affairs information is particularly sensitive.
 - (d) The names and titles of the third parties is recorded in the context of being members of the Expert Group and in their professional and official capacity as senior clinicians, rather than in a personal or private capacity.
 - (e) There is no information before me to demonstrate any of the third parties would object to the disclosure of their personal affairs information to the Applicant.
 - (f) Nor do I consider disclosure of the personal affairs information would, or would be reasonably likely to, endanger the life or physical safety of any person.
 - (g) In this case, I am of the view disclosure of the personal affairs information would serve the public interest in that it would provide greater public transparency in relation to the role and functions of the Agency in its response to the COVID-19 pandemic.
26. Accordingly, I am not satisfied certain information in the document is exempt under section 33(1).
27. The Schedule of Documents in **Annexure 1** sets out my decision in relation to section 33(1).

Section 25 – Deletion of exempt or irrelevant information

28. 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.

¹¹ *Coulson v Department of Premier and Cabinet* [2018] VCAT 229.

29. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'¹² 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 25.¹³
30. I am satisfied the information the Agency determined are not relevant to the terms of the request is irrelevant information for the purposes of section 25.
31. Further, I am satisfied it is practicable to delete this information from the document as to do so would not require substantial time and effort and the document would retain meaning.

Conclusion

32. On the information before me, I am not satisfied certain information in Document 1 is exempt under section 33(1).
33. As I am satisfied it is practicable to provide an edited copy of the document with irrelevant information deleted in accordance with section 25, access to the document is granted in part.
34. The Schedule of Documents in **Annexure 1** sets out my decision in relation to section 33(1).

Review rights

35. If either party to this review is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.¹⁴
36. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹⁵
37. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹⁶
38. 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.
39. 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.¹⁷

Notification of third party review rights

40. As I have determined to release the personal affairs information of third parties, if practicable, I am required to notify those persons of their right to seek review by VCAT of my decision within 60 days from the date they are given notice.¹⁸

¹² *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].

¹³ *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].

¹⁴ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

¹⁵ Section 52(5).

¹⁶ Section 52(9).

¹⁷ Sections 50(3F) and (3FA).

¹⁸ Sections 49P(5), 50(3) and 52(3).

41. Given the Agency is likely to have the contact details for each of the third parties as members of the Expert Group, I am satisfied it would be practicable to notify each person to advise them of their right to seek review of my decision by VCAT.
42. Accordingly, OVIC will provide the Agency with a notice to issue to each third party setting out their review rights.

When this decision takes effect

43. My decision does not take effect until the third parties' 60 day review period expires.
44. If a review application is made to VCAT, my decision will be subject to any VCAT determination.

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
1.	Undated	CLEG Members List	1	Released in part Section 33(1)	Release in part Section 25 The document is to be released with the information deemed irrelevant by the Agency deleted in accordance with section 25.	Section 33(1): For the reasons outlined in the Notice of Decision, I am not satisfied that the information is exempt under section 33(1). Section 25: I am satisfied the information deemed irrelevant by the Agency in Document 1 is not relevant to the terms of the Applicant's request. I am satisfied it is practicable to provide an edited copy of the document with irrelevant information deleted in accordance with section 25.

Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
2.	03/02/2021	CLEB Meeting Action Register	17	Released in part Section 33(1)	Not subject to review	