

Practice Note 12: Section 33 Exemption – Documents Affecting Personal Privacy of Third Parties

Summary

Any person's name, address or other information by which they may be identified is information relating to their personal affairs.

In making a decision under s.33, the principles in the cases about "unreasonable disclosure" are relevant.

1. [Background](#)
2. [Section 33](#)
3. [What constitutes "personal affairs"](#)
4. [Consultation with applicants](#)
5. [Determining whether disclosure is unreasonable](#)
6. [Consultation with third parties](#)
7. [Reverse FOI rights](#)
8. [FOI and the *Information Privacy Act 2000*](#)
9. [Further reading](#)
10. [Personal information checklist](#)

1. Background

A freedom of information (FOI) request may seek access to documents that include personal information of people other than the applicant.

This practice note concerns the assessment of documents under the *Freedom of Information Act 1982* ("the Act") that contain information relating to the personal affairs ("personal information") of individuals. Its purpose is to provide guidance to FOI decision makers on assessing personal information, applying the reasonableness test, and thereby balancing the general right of access to government documents with an individual's right to privacy.

Deciding whether or not it is reasonable to release personal information of individuals can be a complex process and the context in which information appears in the documents is important.

[Back to top](#)

2. Section 33

- *Document affecting personal privacy*

(1) A document is an exempt document if its disclosure under this Act would involve the unreasonable disclosure of information relating to the personal affairs of any person^[1] (including a deceased person).

(2) Subject to subsection (4), the provisions of subsection (1) do not have effect in relation to a request by a person for access to a document by reason only of the inclusion in the document of matter relating to that person.

(2A) An agency or Minister, in deciding whether the disclosure of a document under this Act would involve the unreasonable disclosure of information relating to the personal affairs of any person, must take into account, in addition to any other matters, whether the disclosure of the information would, or would be reasonably likely to, endanger the life or physical safety of any person.

(3) ...[Where] the agency or Minister decides to grant access to (a document containing information relating to the personal affairs of any person other than the applicant) ...[the agency or Minister] shall if practicable notify the person who is the subject of the information ... of the decision and the right of appeal against the decision provided by section 50(2)(e)...

[11] Section 33(9) Information relating to the personal affairs of any person includes information—

- (a) that identifies any person or discloses their address or location; or
- (b) from which any person's identity, address or location can reasonably be determined.

[Back to top](#)

3. What constitutes “personal affairs”

Information that identifies any person, their address or location or information that can enable their identity, address or location to be reasonably determined is information relating to the personal affairs of any person. This means that information in a document that identifies, or reasonably can enable someone to determine, who an individual is, where they live, or where they are located, comes within the ambit of s.33 of the Act.

Examples:

Below are some examples of personal information:

- name;
- email address;
- telephone number;
- a document that contains pieces of information or words that separately would be inconsequential, but from which a person's identity, address or location can reasonably be determined when the information is read together;
- handwritten notes and signatures;

- a note that could only have been written by one person;
- voice recordings, photographs and videos;
- information that is known in the public arena about a person's private life or personal affairs can still be information relating to their personal affairs.^[1] Examples of such information may include charges brought or complaints made against a person.

^[1] *Gunawan v Department of Education* (unreported, VCAT, Davis SM, 15 December 1998).

[Back to top](#)

4. Consultation with applicants

Some applicants state in their FOI requests that they are not seeking certain categories of personal information. Alternatively, the agency may wish to obtain the applicant's view on whether they are seeking personal information contained in the relevant documents. For example, the following standard wording could be included in an acknowledgment letter:

Some of the relevant documents may contain personal information of other people (for example, name, address). In order to process your request, I may need to consult each person to determine if disclosure of their personal information is unreasonable. To avoid any unnecessary delays in having to consult with all of these people, could you please advise if you agree to have the personal information deleted from the documents.

[Back to top](#)

5. Determining whether disclosure is unreasonable

When determining the reasonableness of disclosure of information relating to the personal affairs of an individual, a decision maker is required to undertake a balancing exercise of interests, by considering all of the circumstances of the particular case or request. To establish whether disclosure is unreasonable, the public interest in

disclosure must be balanced against the personal interest in privacy.^[1] The Act (s.33(2A)) requires a decision maker to specifically take into account whether disclosure would be reasonably likely to endanger the life or physical safety of any person. In addition, a number of Victorian Civil and Administrative Tribunal (VCAT) cases have identified various other issues to be considered in determining whether to release personal information.^[2]

The following is a 'checklist' of factors relevant to considering all of the circumstances of a case when determining reasonableness of disclosure. The list is not exhaustive and some aspects will be of greater relevance than others for each request.

Checklist:

- (1) **Nature of the information in question, for example, names, medical information, criminal history**
- (2) **Circumstances in which the information was obtained (other exemptions may also apply, for example, material obtained in confidence)**
- (3) **Opinion of the individual concerning the release of their personal information contained in the documents**
- (4) **Whether the information is already in the public domain**
- (5) **Whether disclosure would be reasonably likely to endanger the life or physical safety of *any* person**
- (6) **Applicant's reasons for seeking the documents (note that the applicant is not required to provide reasons for making an FOI request, however their reasons are a factor that can be taken into account regarding the disclosure of personal information)**
- (7) **Likelihood that disclosure would cause stress, anxiety or embarrassment**
- (8) **Whether the applicant's purpose for seeking access (if known) will be achieved if the information is disclosed**
- (9) **Whether disclosure would be detrimental to the public interest (not necessarily limited to the public interest in protecting an individual's privacy)**
- (10) **Whether the public interest would be promoted by releasing the information**
- (11) **Likelihood that the applicant will disseminate or disclose the information**

(12) The current relevance of the information

The FOI cases before the courts and the VCAT have come to different conclusions concerning the reasonableness of disclosure in different circumstances and there is no general rule, as decisions are made on a case-by-case basis.

Tip: Do not assume that masking the name of an individual will always be enough to de-identify the information. It could still be possible to identify a person by leaving in specific details such as dates, times and unique facts that could only apply to a particular person.

[1] *Coulston v OPP Vic* [2010] VCAT 1234

[2] See, eg, *Page v Metropolitan Transit Authority* (1988) 2 VAR 243 at 246; *Victoria Police v Marke* [2008] VSCA 218 at [19] (per Maxwell P), *XYZ v Victoria Police* [2010] VCAT 255.

[Back to top](#)

6. Consultation with third parties

Although there is no explicit obligation to do so, an agency will often contact third party individuals to get their views on the release of their information as part of determining the level of unreasonableness if the information was disclosed under FOI. Although consultation with third parties is not explicitly required, it can be considered that there is an implicit requirement to consult because of s.33(2A) of the Act, as the third party would be in the best position to advise whether the disclosure would, or would be reasonably likely to, endanger their life or physical safety.

Sometimes there will be a difference of opinion between an FOI decision-maker who believes that the Act requires that an individual's personal information be released and the individual who objects to that release. Although the opinion of the affected individual is an important consideration, all the circumstances regarding a particular request need to be considered and the FOI decision-maker may decide that, despite the individual's objection, it is still reasonable to release the information.^[1]

[1] In *Morgan v Department of Human Services* [2008] VCAT 2420, VCAT decided in the context of that case that release of certain personal information in the face of objections from staff would be unreasonable.

[Back to top](#)

7. Reverse FOI rights

Where an FOI decision-maker has decided that it is not unreasonable to release personal information, the person that the information concerns must be notified of the decision to release their personal information, if it is practicable to do so.[1]

If the individual wishes to appeal to the VCAT against the decision, he or she must do so within 60 days of receiving notice of the decision. This is known as the 'reverse FOI right' because it gives the third party a right to seek to prevent access to documents under the Act.

Note that where an FOI decision maker has decided to release personal information the documents cannot be released for 60 days. This is to allow for the person concerned to exercise his or her right to appeal against the decision.[2]

[1] Section 33(3) of the Act. Also written notice must be given when an FOI decision maker has refused access to personal information and that decision has been appealed by the FOI applicant, s.53A. This notification must occur even when more than one exemption has been applied and it appears that the appeal is not specifically targeting the s.33 decision.

[2] Section 52 of the Act.

[Back to top](#)

8. FOI and the *Information Privacy Act 2000*

Where the Act has been applied properly in the processing of an FOI request, a disclosure of information relating to the personal affairs of third parties will not breach the *Information Privacy Act 2000* ('IPA').

However, failure to consider properly the reasonableness of disclosure of the personal affairs of a third party could result in a complaint to the Privacy Commissioner under the IPA.[\[1\]](#)

[\[1\]](#)Smith v Victoria Police (General) [2005] VCAT 654

[Back to top](#)

9. Further reading

Coulston v OPP Vic [2010] VCAT 1234

Gunawan v Department of Education [1999] VCAT 665.

Marke v Victoria Police [2007] VSC 522

Morgan v Department of Human Services [2008] VCAT 2420

Page v Metropolitan Transit Authority (1988) 2 VAR 243

Smith v Victoria Police (General) [2005] VCAT 654

Victoria Police v Marke [2008] VSCA 218

XYZ v Victoria Police [2010] VCAT 255

[Back to top](#)

10. Personal information checklist

PROCESSING PERSONAL INFORMATION CHECKLIST

Is there personal information to be assessed?

- o Information in the relevant documents to be assessed identifies person, address or location or information can enable identity, address or location to be reasonably determined
- o Is the applicant seeking the personal information? (refer to applicant's terms of request / consider obtaining the applicant's view on whether they seek the information)
- o If personal information is not sought by the applicant, delete it from the documents as irrelevant material under s.25 of the Act and inform the applicant

Determining whether disclosure is unreasonable

- o Nature of the information in question e.g. names, medical information, criminal history
- o Circumstances in which the information was obtained (other exemptions may also apply e.g. material obtained in confidence)
- o Opinion of the individual concerning the release of their personal information contained in the documents (ensure consultation responses are well-documented)
- o Whether the information is already in the public domain
- o Whether disclosure would be reasonably likely to endanger the life or physical safety of *any* person
- o Applicant's reasons for seeking the documents (note that the applicant is not required to provide reasons for making an FOI request, however their reasons are a factor that can be taken into account regarding the

disclosure of personal information)

○ Likelihood that disclosure would cause stress, anxiety or embarrassment

○ Whether the applicant's purpose for seeking access (if known) will be achieved if the information is disclosed

○ Whether disclosure would be detrimental to the public interest (not necessarily limited to the public interest in protecting an individual's privacy)

○ Whether the public interest would be promoted by releasing the information

○ Likelihood that the applicant will disseminate or disclose the information

○ The current relevance of the information

Exempting personal information from release

○ If you propose to release documents in part but are seeking to de-identify the personal information, just masking the name of the individual may not be enough. It could still be possible to identify a person by leaving in specific details such as dates, times and unique facts.

○ In the decision letter, make sure you address why disclosure of the personal information would be unreasonable

○ If the applicant appeals the decision to VCAT under s.53A of the Act, notice must be given by the agency to a third party whose personal information could be disclosed should the appeal be successful

Decision to release personal information

○ If third party still seeks to have information exempted but FOI officer makes decision to release, inform third party of decision and of the right to lodge an application with VCAT for review of decision to release their information