

GUIDE TO SECTION 33

Documents affecting personal privacy

Elements of the exemption

A document is exempt under section 33(1) of the FOI Act if two conditions are satisfied –

- > disclosure of the document under the FOI Act must ‘involve’ the disclosure of information relating to the ‘personal affairs’ of a person; and
- > such disclosure must be ‘unreasonable’.

Does the document contain personal affairs information?

Section 33(9) makes it clear that information relating to the ‘personal affairs’ of a person includes information that identifies any person or discloses their address or location or by which this can be reasonably determined.

Keep in mind that, whilst on its face the information may not appear identifying, the applicant may already have certain information that, when combined with the information in the document, is identifying.

Section 33(2) provides that any material contained in a document that relates solely to the applicant’s personal affairs is not exempt under section 33(1).

The personal affairs information of a deceased person is still considered the personal affairs information of that person, even though the third party is deceased.

Consider

Does the information relate to a natural person?

Is the information identifying? Who does the personal information relate to?

Does the material relate solely to the applicant’s personal affairs?

Section 33(1) can only apply to natural persons – for instance, the name of a company would not fall under the section 33 exemption.

Mond v Building Commission of Victoria [2012] VCAT 796

In certain circumstances, the personal affairs information comprises statements that the author attributes to a third party, for instance, where the author of the document recounts a conversation with a third party or a statement by a third party.

In *Mond*, the applicant requested documents containing information relating to a complaint they had made to the Building Commission, regarding a builder and a draftsman.

The documents disclosed that certain individuals were involved in the complaint, and included an account of their behaviour. There were also expressions of personal views about the matter under investigation and descriptions of work practices of an individual.

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Mond (continued)

VCAT compared previous decisions on similar circumstances, and held that –

- In some cases, a written expression of opinion by a third party to a respondent about an applicant's conduct relates to the author's personal affairs
- Where opinions are provided by persons in their professional capacity, such opinions are part of their public, rather than private lives, and therefore do not relate to their personal affairs (other exemptions, such as section 30, may apply to this information instead)
- Parts of an account of the behaviour of other persons may relate to the personal affairs of those other persons
- One person's version of events and experiences related to their work, or a description of usual work practices, does not necessarily relate to that person's personal affairs.

Adopting the approach of VCAT requires a close reading of the document, to determine whether the information is the personal affairs information of the author or the personal affairs information of the third party.

Is disclosure of the personal affairs information unreasonable?

If you have assessed a document and you have determined that the document contains personal affairs information, that information is not automatically exempt. You must go on to consider whether disclosure of that personal affairs information is unreasonable.

It is important to begin from a position that the applicant is entitled to access the documents and to only delete information when disclosure would be unreasonable.

The main factors to consider when deciding whether disclosure of the personal affairs is unreasonable include –

- > The circumstances in which the information was obtained;

- > The applicant's interest in the information to be disclosed;
- > The nature of the information to be disclosed and the information which has already been disclosed or is on the public record;
- > Whether the individuals whose personal affairs are included in the documents would be likely to object to the release of that information;
- > Whether any public interest would be promoted by the release of the information;
- > The likelihood of further disclosure of the personal information, if it is released. Under the FOI Act, there is no provision for conditional release; and
- > Whether the disclosure of information relating to the personal affairs of any person would, or would be reasonably likely to, endanger the life or physical safety of any person, as required by section 33(2A) of the FOI Act.

Tip

Assess each of the factors to determine what is relevant and persuasive.

It is important to begin from a position that the applicant is entitled to access the documents and to only delete information when disclosure would be unreasonable.

When the documents concern the personal affairs information of a deceased person, the deceased person's rights are conferred on the deceased's next-of-kin. As such, instead of considering whether the deceased individual would object, you need to consider the opinion of the next-of-kin. This is only one factor to consider when assessing documents.

Section 33(3) – notification

If you decide that the release of personal affairs information in a document is not unreasonable, you are required under section 33(3) of the FOI Act to, if practicable, notify a person whose personal affairs would be disclosed. This is sometimes called “reverse FOI”. The third party can apply to VCAT, under section 50(3) of the FOI Act, for review of the decision to release that information.

The agency is required to notify the third party, or the third party’s next of kin, in all circumstances, regardless of whether the person is known to the applicant or even if the person has consented to disclosure.

The only circumstances in which you do not need to notify the person is where it is not practicable to do so; for instance, this would apply in circumstances where you are unable to locate the person, despite reasonable attempts to do so.

An agency is not required to consult with or provide notification to third parties prior to making a decision to disclose their personal affairs information to an applicant.

The application of section 25

Section 25 of the FOI Act requires an agency or Minister to grant access to a copy of a document containing exempt matter or irrelevant material if it is practicable for the agency or Minister to delete the exempt or irrelevant matter, and an applicant indicates that he or she would wish to have access to such a copy.

There are two factors to consider when determining whether it is ‘practicable’ to delete exempt or irrelevant matter and grant access to the redacted copy of a document. The two necessary considerations are –

- > The ease with which the agency or Minister is able to make deletions to the document in order to make it not exempt; and
- > The efficacy of the outcome of making such deletions; that is, whether the redacted document is meaningful.

If the redacted document retains its meaning after redacting any exempt material, you should consider using section 25.

However, often non-exempt material is intertwined with exempt material to such a degree that it cannot be separated. In these circumstances, it would not be practicable to provide an applicant with an edited copy of such a document. This includes cases where –

- > The applicant’s personal affairs information is intertwined with a third party’s personal affairs information; or
- > Other exempt material is intertwined with a third party’s personal affairs information.

Sometimes, deleting all of the exempt material in the document will have the effect of rendering a document meaningless. Again, it would not be practicable to provide the applicant with a copy of such a document.

Further Information

Visit our website, call or email us:

- > www.foicommissioner.vic.gov.au
- > 1300 842 364 (1300 VIC FOI)
- > enquiries@foicommissioner.vic.gov.au

Other related fact sheets include:

- > The FOI access process
- > Writing FOI access decisions

Disclaimer: This fact sheet does not constitute legal advice and should not be used as a substitute for applying the provisions of the Freedom of Information Act 1982, or any other legal requirement, to individual cases.