



Victorian Government
Solicitor's Office

FOI

The Section 33 Challenge: Now and the Future

Your speakers:

Andrew Field

Victorian Government
Solicitor's Office

Michele Rowland

Victorian Government
Solicitor's Office

Strategic advice
practical legal solutions



Introduction

- What is the challenge for FOI officers?
- Our question (*ie often when it is too late*):
 - Did they seek advice?
- Overview of presentation:
 - What does an FOI officer have to consider under s 33?
 - What is required under the new FOI legislation?



Section 33(1)

- A doc is exempt if:
- disclosure would involve the **unreasonable** disclosure of information
- re the personal affairs of any person (including a deceased person)



Personal Affairs

- Inclusive definition in subsec (9):
- that identifies any person or discloses their address or information; or
- from which any person's identity, address or location can be reasonably determined



Unreasonable disclosure

- It's a balancing exercise – the public interest in disclosure v personal interest of privacy *Vic Pol v Marke* [2008] VSCA 218
- Consider factors which are commonly relevant *Page v Metropolitan Transit Authority* (1988)



Nature of information

- Is it sensitive information? The more sensitive it is, the more likely it will be unreasonable to disclose;
- Is it trivial or innocuous?
- Is it currently relevant?



How obtained

- Was it obtained in confidence?
- But this not a given or presumption re unreasonableness as there may be a public interest which outweighs it. *Kyriazis v Vic Pol* [2011] VCAT 365



Applicant's interest

- What motive or purpose does the Applicant have for seeking access?
- If commendable less likely to be unreasonable cf if to cause embarrassment
- Is purpose likely to be achieved?



Other factors

- Consider the extent to which the information is available publicly
- Whether disclosure may result in the person suffering stress and anxiety



Recent case law

- *DHHS v Herald and Weekly Times P/L*
[2015] VCAT 291
- Involved a request for docs re number of people removed from hospital elective surgery waiting lists because they had died



DHHS v HWT (cont)

- Re s 33(1), not unreasonable because a person reminded of the death of the deceased would not be subject to unacceptable intrusion, given that for years after someone close dies you are reminded of them in course of daily life, and particularly when being on waiting list has no connection to the person's death.



Take away points

- Remember to make the evaluation of whether it is unreasonable to disclose when determining any application of s 33(1)
- Have good evidence in support



The future:

- *Freedom of Information Amendment (Office of the Victorian Information Commissioner) Act 2017;*
- Comes into effect no later than 1 September 2017;
- Expands obligations under s 33;
- - new ss 33 (2B), (2C), (3)*, (3A).



New obligations

- Present obligation: notify person the subject of the information if agency or Minister decides to release info (s 33(3));
- New *additional* obligation – s 33(2B):
- In ***deciding*** whether disclosure is unreasonable:
 - Notify the person the subject of the information;
 - Seek person's view as to whether disclosure should occur;
 - State that if person consents to disclosure etc, person is not entitled to apply to VCAT for a review of decision.



Proviso:

s 33(2B) is subject to s33(2C)

“Despite subsection (2B), an agency or Minister is not required to notify a person if—

- (a) the notification would be reasonably likely to endanger the life or physical safety of that person, or cause that person undue distress, or is otherwise unreasonable in the circumstances; or
- (b) it is not practicable to do so.”



“if practicable”?

Coulston v OPP [2010] VCAT 1234 at [41]:

- Connotes an intention to apply common sense.
- Is not a term of art or a term of precise meaning.
- *Oxford Dictionary*: ‘capable of being put into practice, carried out in action, effected, accomplished or done’;
- *Macquarie Dictionary*: ‘capable of being put into practice, done or effected, esp with the available means or with reason or prudence; feasible’.
- It does not allow for the conclusion that because a task is possible, it must, ergo, be undertaken



Practical implications?

- Consider the context of the personal information (ie the people involved);
- Record the inquiry and how you proceeded;
- Managing resourcing issues?
- Note shift in the “gravity” in pressures in deciding whether to release or not.