



Office of the Victorian
Information Commissioner

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Ms Angelene Falk
Australian Information Commissioner
Office of the Australian Information Commissioner
GPO Box 5218
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Dear Ms Falk

Response to Discussion Paper on the *Disclosure of Public Servants' Names and Contact Details*

Thank you for your office's invitation to comment on the Office of the Australian Information Commissioner's (OAIC) discussion paper regarding the disclosure of public servants' names and contact details when responding to a freedom of information (FOI) request.

This is a topical issue in Victoria, and I am pleased to provide this submission in response to the OAIC discussion paper.

Differences between Commonwealth and Victorian provisions

As you will be aware, there are differences between the personal privacy exemptions in the *Freedom of Information Act 1982* (Cth) (**Commonwealth Act**) and the *Freedom of Information Act 1982* (Vic) (**Victorian Act**).

In determining whether personal information is exempt under section 47F of the Commonwealth Act, a decision maker must determine that disclosure would be unreasonable, and also that disclosure would be contrary to the public interest.

Section 33(1) of the Victorian Act only requires that disclosure of personal information would be unreasonable in the circumstances. However, while the Commonwealth Act requires a further step, in practice, the concept of 'unreasonable' disclosure in the Victorian Act involves balancing the public interest for and against disclosure of personal information.

Since September 2017, the Victorian Act has also included a requirement that an agency must, if practicable, consult with a third party to obtain their views in relation to disclosure of their 'personal affairs information' prior to release of that information. Therefore, a third party's opinion is a relevant, but not determinative, consideration in determining whether disclosure of their personal affairs information is unreasonable.

The approach of Victorian agencies and the Victorian Civil and Administrative Tribunal

A common approach taken by Victorian agencies is to disclose the personal affairs information of agency executives, but refuse access to the personal information of non-executive agency staff on grounds disclosure of such information would be unreasonable. However, in some cases, agencies exempt the

personal information of all staff, regardless of their seniority, on privacy grounds. In reviewing agency decisions, we have also observed many instances in which agencies do not consult with agency staff named in documents prior to refusing access to their personal affairs information on privacy grounds.

Common reasons provided by Victorian agencies for refusing access to personal affairs information of public servants include:

- Names and other identifying information do not add to an understanding of the documents and would not serve any purpose.
- Non-executive staff are generally employed with the understanding that they do not have the authority to act on behalf of the agency and to be accountable for its decision making (as opposed to executive staff who may represent the agency).
- Non-executive staff work under the assumption that their identities and contact information will not generally be released to the public.
- It is inherently stressful for non-executive staff to have their identities and contact information released to the public.
- The individual was consulted and objected to the release of their personal affairs information.

The approach adopted by agencies is relied upon in review proceedings and is generally upheld by the Victorian Civil and Administrative Tribunal (**the Tribunal**). The Tribunal generally accepts it would be unreasonable to disclose the names of non-executive agency staff due to the intrusion on their personal privacy. For example, in the case of *Coulson v Department of Premier and Cabinet (Review and Regulation)* [2018] VCAT 229, the Tribunal noted, '[w]ith ... 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' (at [127]).

This approach is also consistent with previous Tribunal decisions, for example *Smeaton v Victorian WorkCover Authority (General)* [2012] VCAT 1549. However, in a number of decisions, the seniority of agency staff was not the only factor the Tribunal considered, and each decision turns on its particular circumstances.

Approach of the Office of the Victorian Information Commissioner

First, my office encourages agencies to consult with applicants at an early stage to confirm whether the applicant even seeks the names and contact details of agency staff.

Decisions made by myself and the Public Access Deputy Commissioner under the Victorian Act reflect the view that, subject to an agency demonstrating that special circumstances apply, it is not unreasonable to disclose the names and position titles of agency staff, regardless of their seniority where they are merely carrying out their usual duties or responsibilities as public servants. The nature of such information is to be contrasted with the personal information relating to an individual in their personal or private capacity. We consider this approach accords with the object and purpose of the Victorian Act and the Victorian Parliament's intention that the maximum amount of information held by government be disclosed.

While a public servant's classification may be a relevant consideration in certain circumstances, we do not consider it is determinative. This view is consistent with the Victorian Supreme Court of Appeal decision of *Victoria Police v Marke* [2008] VSCA 218 in which it was held there is 'no absolute bar to providing access to documents which relate to the personal affairs of others', the personal privacy exemption 'arises only in cases of unreasonable disclosure', and '[w]hat amounts to an unreasonable disclosure of someone's personal affairs will necessarily vary from case to case' (at [76]). Accordingly, it is not appropriate to take a blanket approach in deciding whether disclosure of public servants' personal information is unreasonable on the basis of the seniority of the public servant, but rather the particular context and circumstances of each matter must be considered.

However, we generally take the view disclosure of the direct office number, mobile number or email address of agency staff, where an applicant does not already know this information, is more likely to be unreasonable. This is particularly so where the involvement of agency staff is peripheral to a decision made by government and the details of more senior agency staff or executives have been disclosed.

I note our approach reflects that of the OIAC and is consistent with Clause 4(3)(b) in Schedule 4 of the *Government Information (Public Access) Act 2009* (NSW) in which the definition of 'personal information' excludes an individual's name and non-personal contact details, position title, public functions and the agency in which they work where such information reveals nothing more than the fact the person is engaged in the exercise of public functions.

From 1 July 2019, my office began publishing our review decisions on OVIC's website and Austlii. Recent decisions that consider the disclosure of public servants' personal information include:

- 'AE1' and *Monash University (Freedom of Information)* [2019] VICmr 37 – a decision to disclose the names of non-executives who made an administrative decision affecting an individual;
- 'AE5' and *Department of Health and Human Services (Freedom of Information)* [2019] VICmr 41 – a decision not to disclose the names of non-executive staff in the context of a workplace investigation; and
- 'AG1' and *Game Management Authority (Freedom of Information)* [2019] VICmr 55 – a decision to disclose publicly available personal information and but not disclose names of staff who were not accountable for final endorsement of a brief.
- 'AD9' and *Monash University (Freedom of Information)* [2019] VICmr 36 – a decision to disclose names of staff but not signatures or mobile numbers.

Conclusion

The OIAC FOI Guidelines are a valuable resource for Commonwealth agencies and also inform other jurisdictions in the exercise of their decision making powers under Freedom of Information legislation. The guidance provided in relation to the disclosure of personal information of public servants is particularly well structured and authoritative, and reflects the approach taken by myself and the Public Access Deputy Commissioner, as discussed above.

While we acknowledge concerns expressed by agencies about the disclosure of personal affairs information of their staff in decisions subject to our review, we consider the Victorian Act requires the maximum amount of information be disclosed unless special circumstances apply. As such, we view any blanket approach to the non-disclosure of public servants' personal affairs information, where that information merely reveals that a public servant was performing their public duties, to be contrary to the object and intent of the Victorian Act.

I have no objection to the OAIC publishing this submission and propose to publish a copy on OVIC's website at the conclusion of the OIAC's consultation process. If you would like to discuss this submission or require further information, please contact myself or Cliff Bertram, Principal Policy Officer at cliff.bertram@ovic.vic.gov.au.

Yours sincerely



Sven Bluemmel
Information Commissioner

