

## Notice of Decision and Reasons for Decision

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Applicant:	'AO9'
Agency:	Victorian Building Authority
Decision Date:	4 October 2019
Exemption considered:	Section 33(1)
Citation:	'AO9' and Victorian Building Authority ( <i>Freedom of Information</i> ) [2019] VICmr 135 (4 October 2019)

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FREEDOM OF INFORMATION – investigations against building practitioners – site addresses – complainant names – information affecting personal privacy.

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 is the same as the Agency's decision in that I have decided to release the document in part.

My reasons for decision follow.

**Joanne Kummrow**  
Public Access Deputy Commissioner

4 October 2019

## Reasons for Decision

### Background to review

1. The Applicant made a request to the Agency for certain documents.
2. Following consultation with the Agency, the Applicant amended their request and sought access to the following documents:

I request the below information for the following building practitioners: [company name and reference], [name and reference], and [name and reference]:

1. A document produced under section 19 of the FOI Act, which comprises a list showing all complaints & defective work received by the [Victorian Building Authority] (VBA) or [Building Practitioners Board] (BPB) against the practitioners, limited to: Builder name or Company name and registration number, date of complaint, VBA or BPB reference number, and street address the subject of the complaint.
  2. A document produced under section 19 of the FOI Act, which comprises a list showing all investigations undertaken by the VBA or BPB against the practitioners, limited to: Builder name or Company name and registration number, date referred to investigations, VBA or BPB reference number, and street address the subject of the complaint.
  3. Document produced under section 19 of the FOI Act, which comprises a list showing all decisions or outcomes of the VBA or BPB against the practitioners, limited to: Builder name or Company name and registration number, date of decision, VBA or BPB reference number, street address the subject of the complaint, and decision or outcome.
3. In its decision, the Agency advised it had identified two lists of information relevant to the Applicant's request and produced a document containing this information in accordance with section 19. The Agency decided to grant access to this document in part.

### Review

4. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
5. I have examined a copy of the document subject to review.
6. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
7. I have considered all communications and submissions received from the parties, including:
  - (a) the Agency's decision on the FOI request;
  - (b) information provided with the Applicant's review application; and
  - (c) the Agency's submission dated 9 September 2019.
8. 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.

## Review of exemptions

9. The Agency relied on the exemption in section 33(1) to refuse access to the document in part. The Agency's decision letter sets out the reasons for its decision.

### **Section 33(1)**

10. 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 information relating to the 'personal affairs' of a person other than the Applicant;<sup>1</sup> and
  - (b) such disclosure would be 'unreasonable'.
11. 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 this may be reasonably determined.<sup>2</sup>

### *Does the information constitute 'personal affairs information'?*

12. I am satisfied the information exempted by the Agency under section 33(1), which in this instance is the names of complainants and site addresses of certain investigations, is personal affairs information for the purposes of section 33(1).

### *Would disclosure of the information constitute unreasonable disclosure?*

13. Determining whether disclosure of personal affairs information would be unreasonable involves balancing the public interest in the disclosure of official information with the personal interest in privacy in the circumstances of a particular matter.
14. The Agency submitted the following in support of its decision that the release of the personal affairs information is unreasonable:
- (a) the personal affairs information was provided to the Agency by third parties with an expectation of confidentiality;
  - (b) the exempt material was obtained up to 10 years prior to this FOI request, therefore, third parties residing at these premises may be unreasonably exposed to unwanted solicitation or correspondence;
  - (c) the Agency relied on information provided by third parties 'to carry out its functions, and protection of the confidentiality of the complaint process is important to the integrity of the process';
  - (d) the third parties 'would not expect to be scrutinised or exposed simply for providing the Agency with their personal information[']; and
  - (e) while the Applicant has indicated to OVIC they know the identity of certain third parties, the Agency maintains it is unreasonable to disclose information of third parties to other persons.

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<sup>1</sup> Sections 33(1) and (2).

<sup>2</sup> Section 33(9).

15. In support of their review application, the Applicant submitted:

The reason we need information from VBA is to be able to contact all affected home owners and exposed this Builder for ALL [their] malpractices. There are home owners who don't even know that the houses which this Builder may have built could be non-complying and they would keep paying off mortgage for the rest of their life.

Home owners until now have been scared and not able to put voice to raise their concern and grief. The trauma this Builder creates in everyone's life is unbelievable. As the affected home owners are scattered far and wide and not knowing about similarly affected other owners, this is the reason why there has been no awareness about all the wrong doing by this Builder

[...]

We, all affected home owners want justice against this Builder for lack of competence and leaving us home owners with a MORTGAGE to pay millions of dollars for rest of our life not knowing if [the] construction would even last for that long.

16. In determining whether the release of the personal affairs information is unreasonable, I consider the following matters are particularly relevant in the circumstances of this matter:

- (a) the nature of the personal affairs information (for example, whether it is sensitive or its current relevance);
- (b) the circumstances in which the information was obtained;
- (c) the Applicant's interest in the information, including their purpose or motive for seeking access to the documents;
- (d) whether any public interest would be promoted by disclosure; and
- (e) whether the individuals to whom the information relates consent or object to the disclosure.

17. I have also taken into consideration that 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 disclosed to them as they choose.<sup>3</sup>

18. Section 33(2A) requires that, in deciding whether the disclosure of a document would involve the unreasonable disclosure of information relating to the personal affairs of any person, I must take into account whether the disclosure of the information would, or would be reasonably likely to, endanger the life or physical safety of any person. However, I do not consider this to be a relevant factor in the circumstances.

19. In this matter, the personal affairs information was obtained by the Agency in a specific context, namely, complaints lodged by third parties to the Agency in relation to specific building practitioners.

20. I am satisfied it would be unreasonable to release personal affairs information of complainants, as there is a strong public interest in maintaining the Agency's ability to obtain information voluntarily provided by members of the public in relation to defective works or misconduct by registered building practitioners.

21. While the Applicant has provided documentation from other alleged affected parties, even where an applicant claims to know the identity of a third party (including a complainant), disclosure of their

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<sup>3</sup> *Victoria Police v Marke* [2008] VCSCA 218 at [68].

personal affairs information in documents under the FOI Act may still be unreasonable in the circumstances.<sup>4</sup>

22. I am mindful that, in this matter, I do not have specific information before me regarding whether the third parties provided information to the Agency on a confidential basis or their views regarding the release of their personal affairs information to the Applicant. In any case, I consider the relevant third parties would more likely than not have considered the information was communicated in confidence to the Agency given the nature of this matter.
23. I accept that if third parties, who provide voluntarily information to the Agency about registered building practitioners for the purpose of the Agency's regulatory functions, were aware such information would be routinely disclosed under the FOI Act, such persons would be less likely to communicate similar information in the future. As a result, the future reporting of defective building works may be impaired. I am satisfied this would have a detrimental impact on the Agency's ability to carry out its important regulatory, investigative and enforcement functions in relation to the building industry and registered building practitioners.
24. While I acknowledge the Applicant's interest in obtaining access to the requested information in full, I consider the privacy of third parties outweighs the Applicant's interest in the documents in this instance.
25. Accordingly, I am satisfied the exemption in section 33(1) applies to the document.

#### ***Deletion of exempt or irrelevant information***

26. Section 25 requires an agency to grant access to an edited copy of a document when it is practicable for the agency or Minister to delete exempt or irrelevant information and the applicant agrees to receiving such a copy.
27. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'<sup>5</sup> and the effectiveness of the deletions. Where deletions would render the document meaningless they are not 'practicable' and release of the document is not required under section 25.<sup>6</sup>
28. I have considered the effect of deleting exempt information from the documents. In my view, it is practicable to delete the exempt information, because it would not require substantial time and effort, and the edited documents would retain meaning.

#### ***Conclusion***

29. On the information available, I am satisfied the exemptions in section 33(1) applies to the document.
30. As it is practicable to edit the documents to delete exempt information, I have determined to grant access to the documents in part in accordance with the Agency's decision.

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<sup>4</sup> *AB v Department of Education and Early Childhood Development* [2011] VCAT 1263 at [58]; *Akers v Victoria Police* [2003] VCAT 397.

<sup>5</sup> *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].

<sup>6</sup> *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].

### ***Review rights***

31. If either party to this review is not satisfied with my decision, they are entitled to apply to the Victorian Civil and Administrative Tribunal (**VCAT**) for it to be reviewed.<sup>7</sup>
32. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.<sup>8</sup>
33. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.<sup>9</sup>
34. Information about how to apply to VCAT is available online at [www.vcat.vic.gov.au](http://www.vcat.vic.gov.au). Alternatively, VCAT may be contacted by email at [admin@vcat.vic.gov.au](mailto:admin@vcat.vic.gov.au) or by telephone on 1300 018 228.
35. 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.<sup>10</sup>

### ***When this decision takes effect***

36. My decision does not take effect until the relevant review period (stated above) expires. If a review application is made to VCAT, my decision will be subject to any VCAT determination.

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<sup>7</sup> The Applicant in section 50(1)(b) and the Agency in section 50(3D).

<sup>8</sup> Section 52(5).

<sup>9</sup> Section 52(9).

<sup>10</sup> Sections 50(3F) and (3FA).