

Notice of Decision and Reasons for Decision

Applicant:	'AP7'
Agency:	Wellington Shire Council
Decision Date:	11 October 2019
Exemptions considered:	Sections 30(1), 33(1), 35(1)(b)
Citation:	'AP7' and Wellington Shire Council (<i>Freedom of Information</i>) [2019] VICmr 142 (11 October 2019)

FREEDOM OF INFORMATION – workplace complaints – incident report - correspondence between agency officers – information communicated in confidence – personal affairs information

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 differs from the Agency's decision.

I am satisfied certain information in the documents is exempt under sections 30(1), 33(1) and 35(1)(b). However, I am not satisfied the personal affairs information deleted by the Agency in Document 1 is exempt under section 33(1).

As it is practicable to edit certain documents to delete exempt information, I have determined to grant access to those documents in part.

The Schedule of Documents in **Annexure 1** sets out my decision in relation to each document.

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner
11 October 2019

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency for access to:
 - (a) documents with reference to or about a named person between two named Agency officers; and
 - (b) documents or any other written communications between named Agency officers relating to an incident report submitted to the Agency.
2. In its decision, the Agency identified 19 documents falling within the terms of the Applicant's request. It decided to grant access to five documents in part, 12 documents in full and released two documents outside of the FOI Act.

Review

3. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
4. This review relates to five documents to which the Agency granted access in part.
5. I have examined copies of the documents 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) the Applicant's submission dated 8 August 2019 and information provided with the Applicant's review application; and
 - (c) the Agency's submission dated 27 June 2019 and information provided by the Agency during this review.
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 exemptions in sections 33(1) and 35(1)(b) to refuse access to the documents 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;¹ and

¹ Sections 33(1) and (2).

(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.²

Do the documents contain personal affairs information of individuals other than the Applicant?

12. The Agency relied on the exemption in section 33(1) to delete the name of a third party in Document 1.
13. I am satisfied this information constitutes personal affairs information for the purposes of section 33.

Would the release of this information be unreasonable?

14. In determining whether the release of the personal affairs information is unreasonable, I have given weight to the following factors:
- (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) whether the individual to whom the information related consents or objects to the disclosure; and
 - (d) the likelihood of further disclosure of the information.
15. Document 1 contains an internal email between Agency staff in relation to a workplace complaint. It contains a statement whereby the author of the email informed the recipient of the email the complainant had a meeting with the third party. While the third party's personal affairs information is contained in internal communications between Agency officers in which the Applicant was not privy, given the context in which the name appears, namely, the conveyance of information provided by the Applicant, I am not satisfied it would be unreasonable to disclose the name of the third party.
16. There is no information before me concerning the views of the third party as to the release of their personal affairs information in the document. However, given the nature of the information, I consider it likely that if consulted, they would not object to the release of their name.
17. 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 is a relevant factor in the circumstances.
18. I have also taken into consideration 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.³ In the circumstances, I consider it would be reasonably unlikely the Applicant would further disseminate the personal affairs information.
19. Accordingly, I am not satisfied the personal affairs information is exempt under section 33(1).

² Section 33(9).

³ *Victoria Police v Marke* [2008] VCSCA 218 at [68].

Section 35(1)(b)

20. A document is exempt under section 35(1)(b) if two conditions are satisfied:
- (a) disclosure would divulge information or matter communicated in confidence by or on behalf of a person or a government to an agency or a Minister; and
 - (b) disclosure would be contrary to the public interest as it would be reasonably likely to impair the ability of an agency or a Minister to obtain similar information in the future.

Was the information or matter communicated in confidence?

21. When determining whether information was communicated in confidence, it is necessary to consider the position from the perspective of the communicator.⁴ In this case, the individuals who provided the information to the Agency.
22. Further, confidentiality can be express or implied from the circumstances of the matter.⁵
23. The information considered exempt by the Agency includes information communicated internally, including:
- (a) emails between Agency officers discussing an incident report lodged by an employee and the agreed approach to handling the incident, both administratively and practically;
 - (b) emails conveying information provided by third parties in relation to workplace incidents; and
 - (c) information communicated from an external third party who was engaged to investigate workplace complaints.
24. Generally, the exemption in section 35(1)(b) applies to information communicated to an agency from outside sources, not to internal communications between agency staff carrying out their usual duties and responsibilities. However, in certain circumstances, section 35(1)(b) may apply to information communicated in confidence between agency officers, for example, where an agency officer provides confidential information to their agency to assist in the investigation of a workplace incident or dispute.⁶
25. In this matter, information was communicated to Agency officers managing the investigation of the workplace complaints by Agency officers, in their capacity as informants or complainants. Accordingly, I am satisfied the nature of this communication falls within the scope of information communicated in confidence to the Agency under section 35(1)(b).
26. While I do not have information before me to confirm the Agency officers communicated information to the Agency on a confidential basis, I am satisfied they would reasonably have had an expectation it was being communicated in confidence to the Agency given the nature and circumstances of what would have been a sensitive matter.
27. In contrast, I am not satisfied communications between Agency officers who were responsible for managing the investigation of workplace complaints is information communicated in confidence to the Agency for the purposes of section 35(1). Accordingly, I am not satisfied information of this nature is exempt under section 35(1)(b).

⁴ *XYZ v Victoria Police* [2010] VCAT 255 at [265].

⁵ *Ibid.*

⁶ See *Sportsbet v Department of Justice* [2010] VCAT 8 at [71]-[78]; *XYZ v Victoria Police* [2010] VCAT 255 at [287]-[288]; and *Birnbauer v Inner and Eastern Health Care Network* [1999] VCAT 1363 at [14]-[15].

28. The Agency relied on the exemption in section 35(1)(b) to exempt information regarding the location of the incident report in terms of document management. However, I am not satisfied the exemption applies to information of a procedural or administrative nature. Accordingly, I am not satisfied information of this nature is exempt under section 35(1)(b).

Would disclosure of the information impair the Agency from obtaining similar information in the future?

29. The fact the information was communicated in confidence is not the only consideration in relation to the exemption in section 35(1)(b).
30. The exemption also requires I consider whether the Agency would be impaired from obtaining similar information in the future if the information is disclosed under the FOI Act. This means I must consider whether, should the information be disclosed, others in the position of the communicators would be reasonably likely to be inhibited or deterred from providing similar information to the Agency in the future.
31. I accept the Agency relies on information provided by employees voluntarily in order to deal with and investigate workplace complaints and incidents involving its employees. Such information will, by its nature, generally be highly personal, sensitive and confidential.
32. I consider it likely some Agency officers would not make formal complaints or provide complaint-related information if they could not do so confidentially. I consider this would be a significant and detrimental outcome that would impede the ability of the Agency to conduct a thorough and considered investigation in order to ensure it provides a safe workplace for its employees. Accordingly, I am satisfied disclosure of this information would be contrary to the public interest as it would be reasonably likely to impair the Agency's ability to obtain similar information in the future.
33. However, I am not satisfied disclosure of information of an administrative or procedural nature would be reasonably likely to impair the Agency's ability to obtain similar information in the future, particularly where the communications do not disclose information communicated by complainants.
34. The Schedule of Documents in **Annexure 1** sets out my decision in relation to information exempt under section 35(1)(b).

Section 30(1)

35. While the Agency did not rely on section 30(1), having reviewed the documents, I am of the view certain information in Documents 1, 4 and 5 is exempt under this section, rather than section 35(1)(b).
36. Document 1 contains internal advice from an Agency officer regarding the management of the workplace complaint lodged by an employee.
37. Document 4 contains information communicated between Agency officers regarding a workplace complaint.
38. Document 5 is an email from a consultant to a senior Agency officer regarding the consultant's investigation into various workplace complaints. The email was forwarded from the senior officer to another senior officer.
39. A document will be exempt under section 30(1) if the following requirements are met:
- (a) the document was prepared by an officer of the relevant agency;

- (b) the document discloses matter in the nature of opinion, advice or recommendation prepared by an officer or Minister, or consultation or deliberation that has taken place between officers, Ministers or an officer and a Minister;
- (c) such matter was made in the course of, or for the purpose of, the deliberative processes involved in the functions of an agency or Minister or of the government; and
- (d) disclosure of the document would be contrary to the public interest.

40. The exemption does not apply to purely factual material in a document.⁷

Were the documents prepared by an officer of the Agency?

- 41. The term 'officer of an Agency' is defined in section 5(1). It includes a member of the agency, a member of the agency's staff, and any person employed by or for the agency, whether that person is one to whom the provisions of the *Public Administration Act 2004* (Vic) apply or not.
- 42. The phrase has been interpreted broadly and includes a member of the agency, a member of the agency's staff, and any person engaged by or for the agency, whether or not that person is one to whom the provisions of the *Public Administration Act 2004* (Vic) apply.
- 43. I note the Victorian Civil and Administrative Tribunal (**VCAT**) has recognised the words of section 30(1) are wide enough to cover a third party consultant engaged by or on behalf of an agency.⁸
- 44. In this matter, I am satisfied the consultant engaged to investigate the workplace complaints is an 'officer of an agency' for the purpose of section 5(1).
- 45. Accordingly, I am satisfied the relevant documents were prepared by Agency officers.

Do the documents disclose matters in the nature of opinion, advice, recommendations, consultation or deliberation between officers?

- 46. Having reviewed the documents, I am satisfied the documents contain matter in the nature of advice, opinion, recommendations, consultation or deliberation between Agency officers in response to workplace complaints during the course of a workplace complaint investigation.

Was the opinion, advice, recommendation, consultation or deliberation disclosed in the documents provided in the course of, or for the purpose of, the deliberative processes of the Agency?

- 47. I am satisfied the advice was provided in the course of, or for the purpose of, the deliberative processes of the Agency relating to its management of workplace incidents.

Would disclosure of the matter be contrary to the public interest?

- 48. I must also be satisfied releasing this information would not be contrary to the public interest. This requires a 'process of the weighing against each other conflicting merits and demerits'.⁹
- 49. In deciding whether disclosure of the information would be contrary to the public interest, I have given weight to the following factors:¹⁰

⁷ Section 30(3).

⁸ *Thwaites v Department of Human Services (No 2)* (1998) 14 VAR 347; *Mees v University of Melbourne (General)* [2009] VCAT 782 at [31] and *Koch v Swinburne University* [2004] VCAT 1513 at [15].

⁹ *Sinclair v Maryborough Mining Warden* [1975] HCA 17; (1975) 132 CLR 473 at 485, adopted in *Department of Premier and Cabinet v Hulls* [1999] VSCA 117 at [30].

¹⁰ *Hulls v Victorian Casino and Gambling Authority* (1998) 12 VAR 483.

- (a) the right of every person to gain access to documents under the FOI Act;
- (b) the nature of disclosure under the FOI Act, which provides for unrestricted and unconditional disclosure of documents;
- (c) the degree of sensitivity of the issues involved, particularly in the context of workplace complaints investigations;
- (d) the communication took place during a workplace complaints investigation prior to the finalisation of the complaints, and at a point at which Agency officers were being informed of, overseeing and deliberating on potential steps and actions to be taken;
- (e) the likelihood disclosure of the documents would inhibit Agency officers from voluntarily participating in workplace complaint investigations, including the provision of information, and possibly the making of complaints out of concern information provided to the Agency about a complainant or a person the subject of a complaint could be released;
- (f) the Applicant was provided with a copy of the final investigation report and informed about the findings in the report; and
- (g) the public interest in ensuring workplace complaint investigations are able to be adequately documented by Agency staff, including external investigators, conducted fairly and with the necessary degree of confidentiality.

50. Accordingly, I am satisfied certain information in the documents is exempt under section 30(1).

51. The Schedule of Documents in **Annexure 1** sets out my decision in relation to information exempt under section 30(1).

Deletion of exempt or irrelevant information

52. 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.

53. Determining what is ‘practicable’ requires consideration of the effort and editing involved in making the deletions ‘from a resources point of view’¹¹ 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 25.¹²

54. I have considered the effect of deleting exempt information from the documents. In my view, it is practicable to delete the exempt information as to do so would not require substantial time and effort, and the edited documents would retain meaning.

¹¹ *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].

¹² *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].

Conclusion

55. On the information before me, I am satisfied certain information in the documents is exempt under sections 30(1), 33(1) and 35(1)(b). However, I am not satisfied the personal affairs information deleted by the Agency in Document 1 is exempt under section 33(1).
56. As it is practicable to edit certain documents to delete exempt information, I have determined to grant access to those documents in part.
57. The Schedule of Documents in **Annexure 1** sets out my decision in relation to each document.

Review rights

58. If either party to this review is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.¹³
59. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹⁴
60. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹⁵
61. Information about how to apply to VCAT is available online at www.vcat.vic.gov.au. Alternatively, VCAT may be contacted by email at admin@vcat.vic.gov.au or by telephone on 1300 018 228.
62. 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.¹⁶

Other matters

63. Section 49P(5) states that if I decide to disclose a document claimed to be exempt under sections 33(1) and 35(1)(b) I must, if practicable, notify any person who has a right to apply to VCAT for a review of my decision of their right to do so.
64. In considering the meaning of 'practicable' in relation to other sections of the FOI Act, VCAT has stated the following:

The use of the word 'practicable' in the legislation to my mind connotes a legislative intention to apply common sense principles. 'Practicable' is not a term of art or a term of precise meaning.

.... The use of the word indicates there should be imported into the process the exercise of judgment by the agency concerned. It does not allow for the conclusion that because a task is possible, it must, ergo, be undertaken.¹⁷

65. VCAT also considers the possibility of an unnecessary intrusion into the lives of third parties is relevant when assessing the practicability of notifying them.¹⁸
66. I have decided notifying the relevant third party in Document 1 would be an unnecessary intrusion for the following reasons:

¹³ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

¹⁴ Section 52(5).

¹⁵ Section 52(9).

¹⁶ Sections 50(3F) and (3FA).

¹⁷ *Re Schubert and Department of Premier and Cabinet* (2001) 19 VAR 35 at [45].

¹⁸ *Coulston v Office of Public Prosecutions Victoria* [2010] VCAT 1234 at [42].

- (a) the nature of the information; and
- (b) the context in which the information was provided, being predominantly communicated by the Applicant;

67. On balance, I am satisfied it is practicable to notify the remainder of the third parties of their right of review.

When this decision takes effect

68. I have decided to release documents that contain information relating to the personal affairs of a third party and information provided in confidence by or on behalf of third parties.

69. The relevant third parties will be notified of my decision and are entitled to apply to VCAT for a review within 60 days from the date they are given notice.

70. 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.

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
1.	[Date]	Email chain	5	Released in part Sections 33(1), 35(1)(b)	Release in part Sections 30(1), 25 This document is to be released to the Applicant with exception to the following information which is exempt under section 30(1) and is to be deleted: (a) words 15 to 25 of paragraph one in the body of the email dated [date and time]; (b) lines 2 to 5 of paragraph one in the body of the email dated [date and time]; and (c) paragraphs 3 and 4 in the body of the email dated [date and time].	Document 1 consists of an email chain between Agency officers in response to a workplace complaint. Section 33(1): I am not satisfied it would be unreasonable to release the name of a third party in this document for the reasons outlined above. Section 35(1)(b): I am not satisfied the information exempted by the Agency under this section was provided to the Agency in confidence for the reasons outlined above. Accordingly, I am not satisfied the information is exempt under section 35(1)(b). Section 30(1): While the Agency did not rely on section 30(1), I am satisfied certain information in this document is exempt under section 30(1) for the reasons outlined above. Section 25: I am satisfied it is practicable to delete the exempt information in the document and release an edited copy of the document to the Applicant.
2.	[Date]	Email chain	2	Released in part	Release in part	Section 35(1)(b): This document is an internal email between Agency officers.

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
				Section 35(1)(b)	<p>Sections 35(1)(b), 25</p> <p>This document is to be released to the Applicant with exception to the following information which is exempt under section 35(1)(b) and is to be deleted:</p> <p>(a) line 2 of paragraph 1 on page 1 in the body of the email; and</p> <p>(b) paragraphs 3 to 6 on page 1 in the body of the email.</p>	<p>The email contains information communicated by another Agency officer to human resources regarding a workplace incident.</p> <p>Given the context and nature of the information and the manner in which it was provided, I am satisfied the information was communicated by the Agency officer with an expectation of confidentiality. I am also satisfied the disclosure of this information to the Applicant would impair the Agency's ability to receive similar information in the future for the reasons set out above. Accordingly, I am satisfied section 35(1)(b) applies to the information exempted by the Agency.</p> <p>Section 25: See comments for Document 1.</p>
3.	[Date range]	Email chain	6	Released in part Section 35(1)(b)	Release in full	Section 35(1)(b): I am not satisfied the information was communicated to the Agency in confidence for the reasons set out above. Accordingly, I am not satisfied the information is exempt under section 35(1)(b).
4.	[Date range]	Email chain	4	Released in part	Release in part	Section 35(1)(b): This document contains internal emails between Agency officers in

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
				Section 35(1)(b)	<p>Sections 30(1), 25</p> <p>This document is to be released to the Applicant with exception to the following information which is exempt under section 30(1) and is to be deleted:</p> <p>(a) words 18 to 27 in paragraph 3 in the body of the email dated [date and time]; and</p> <p>(b) lines 2 and 3 in paragraph 3 in the body of the email dated [date and time].</p>	<p>response to an email from a union representative regarding an incident report lodged with the Agency.</p> <p>The information redacted by the Agency includes:</p> <p>(a) information of an administrative nature regarding the incident report; and</p> <p>(b) information relating to the agreed response to the incident report.</p> <p>I am not satisfied information of an administrative nature is exempt under section 35(1)(b) for the reasons set out above.</p> <p>Further, I am not satisfied certain information exempted by the Agency relating to the agreed response to a workplace incident is exempt under section 35(1)(b). See comments for Document 1. Accordingly, I am not satisfied certain information in the document is exempt under section 35(1)(b).</p> <p>Section 30(1): While the Agency did not rely on section 30(1), I am satisfied certain information in this document is exempt</p>

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
						<p>under section 30(1) for the reasons outlined above.</p> <p>Section 25: See comments for Document 1.</p>
5.	[Date]	Email chain	3	<p>Released in part</p> <p>Section 35(1)(b)</p>	<p>Release in part</p> <p>Sections 30(1), 33(1), 25</p> <p>This document is to be released to the Applicant with exception of the following information:</p> <p>(a) words 12 to 30 in paragraph 2 in the body of the email dated [date and time] which is exempt under section 30(1) and is to be deleted;</p> <p>(b) paragraphs 3 and 4 in the body of the email dated [date and time] which is exempt under section 30(1) and is to be deleted;</p> <p>(c) lines 1 to 17 in the body of the email</p>	<p>Section 30(1): While the Agency did not rely on section 30(1), I am satisfied certain information in this document is exempt under section 30(1) for the reasons outlined above.</p> <p>In relation to the first sentence in the body of the first email between Agency officers, I consider this is factual information as it merely conveys the purpose of the external consultant's email and does not constitute opinion, advice or recommendations. Accordingly, I am not satisfied this information is exempt under section 30(1).</p> <p>Section 35(1)(b): I am not satisfied section 35(1)(b) applies to the name and email addresses of third parties in this matter. As I am satisfied the information exempted under section 35(1)(b) is exempt under section 30(1), I am not required to consider the application of section 35(1)(b) to the contents of the email.</p>

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
					<p>dated [date and time] which is exempt under section 30(1) and is to be deleted; and</p> <p>(d) the mobile telephone number on page 3 which is exempt under section 33(1) and is to be deleted.</p>	<p>Section 33(1): I am satisfied it would be unreasonable to release the mobile telephone number of a third party. Accordingly, I am satisfied this information is exempt under section 33(1).</p> <p>However, I do not consider it would be unreasonable to release the names and email addresses of certain third parties in this document as the information is not sensitive (for example, the name of the investigator is well known to the Applicant) and the name and email address of another third party is publicly available on their company's website. Accordingly, I am not satisfied this information is exempt under section 33(1).</p> <p>Section 25: See comments for Document 1.</p>