

## Notice of Decision and Reasons for Decision

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Applicant:	'AX9'
Agency:	City of Greater Geelong
Decision date:	20 December 2019
Sections and provision considered:	Section 35(1)(b), 25 'AX9' and City of Greater Geelong ( <i>Freedom of Information</i> ) [2019] VICmr
Citation:	217 (20 December 2019)

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FREEDOM OF INFORMATION – complaint to local council – unreasonable disclosure – information communicated in confidence – contrary to the public interest – disclosure reasonably likely to impair the ability of the agency to obtain similar information in the future

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 position as documented in its email of 4 September 2019 in that I have decided to release one document in part and refuse access to four documents in full.

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

My reasons for decision follow.

Sven Bluemmel  
Information Commissioner

20 December 2019

## Reasons for Decision

### Background to review

1. The Applicant made a request to the Agency for access to the following documents:

All materials the council has before it as stated in correspondence from [named person] dated [date] reference number [reference number] in relation to Planning investigations officer [named person] case reference [reference number] – [residential address] and complaint number [reference number] including but not limited to notes, internal communications, images, correspondence and footage.
2. In its decision dated 15 August 2019, the Agency identified five documents falling within the terms of the Applicant's request. It decided to grant access to all five of those documents in full (**Documents 1-5**).
3. Following receipt of the Agency decision, the Applicant made enquiries about the existence of further documents, prompting the Agency to conduct an additional search.
4. By email dated 4 September 2019, the Agency advised the Applicant it had identified six additional documents (**Documents 6-11**) relevant to the Applicant's original request terms. The Agency determined to grant access to Document 6 in part and Document 11 in full and refused access to Documents 7-10 (inclusive) in full. The Agency released these additional documents to the Applicant on 4 September 2019.

### Review

5. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access to documents in full and in part.
6. I note in the course of this review, the Agency advised OVIC that it considered its email of 4 September 2019 to be a fresh decision. While I appreciate the Agency intended to make a fresh decision, I do not accept this email constitutes a fresh decision as it was not made in accordance with sections 49M and 49MA of the FOI Act. However, I have determined to proceed with the review on the basis of the documents located and processed following the Agency's original decision as detailed in its email to the Applicant on 4 September 2019.
7. I have examined copies of the documents subject to review, being Documents 6-10 (inclusive) as detailed in the Schedule of Documents.
8. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
9. I have considered all communications and submissions received from the parties, including:
  - (a) the Agency's decision on the FOI request and its subsequent email dated 4 September 2019 intending to make a fresh decision;
  - (b) information provided with the Applicant's review application; and
  - (c) the Agency's submissions dated 2 October 2019, 6 December 2019 and subsequent correspondence with OVIC staff.
10. 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**

11. The Agency relied on the exemptions under sections 33(1) and 35(1)(b) to refuse access to Document 10, section 35(1)(b) to refuse access to Documents 7, 8 and 9, and deleted personal affairs information in Document 6 as irrelevant under section 25. The Agency's email of 4 September 2019 to the Applicant sets out the reasons for its application of these exemptions.
12. As the Agency released Documents 1, 2, 3, 4, 5 and 11 to the Applicant in full, these documents are not subject to my review.

### **Section 35(1)(b)**

13. The Agency refused access to Documents 7, 8, 9 and 10 in full, based on its application of section 35(1)(b).
14. 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?*

15. Whether an individual communicated information in confidence is a question of fact.<sup>1</sup>
16. The documents relate to a complaint made by a third party to the Agency and concerns the Applicant.
17. A document does not need to be marked 'confidential' for its contents to be considered to have been communicated in confidence.<sup>2</sup> Confidentiality can be express or implied from the circumstances of a matter.<sup>3</sup>
18. When determining whether information was communicated in confidence, it is necessary to consider the position from the perspective of the communicator.<sup>4</sup> I have carefully considered information in the documents, in particular, from the perspective of the third party who made the complaints to the Agency.
19. Section 35(1)(b) may apply if I am satisfied the information was communicated in circumstances that would give rise to an expectation of confidentiality, and that its disclosure would be contrary to the public interest.
20. Having reviewed the documents and taking into account information provided by the Applicant and the Agency, I am satisfied the third party made their complaint in circumstances in which confidentiality can reasonably be implied based on the nature and context of the relevant information provided to the Agency.

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<sup>1</sup> *Ryder v Booth* [1985] VR 869 at 883; *XYZ v Victoria Police* [2010] VCAT 255 at [264].

<sup>2</sup> *Williams v Victoria Police* [2007] VCAT 1194 at [75].

<sup>3</sup> *Ibid.*

<sup>4</sup> *Ibid.*, *XYZ* at [265].

21. I consider, more often than not, complaints are communicated to the Agency with an expectation of confidentiality by the provider of the information. This is particularly so given the Agency may take adverse regulatory action against another party arising from a complaint made by the third party. Full disclosure of the documents would therefore divulge information communicated in confidence.
22. The Agency has advised that it has not consulted with the third party as it believes it would cause undue stress.

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

23. The second limb of section 35(1)(b) requires an agency to determine whether disclosure of a document would be reasonably likely to impair the agency's ability to obtain similar information in the future. I note the exemption will not be made out if an agency's impairment goes no further than showing the potential providers of the information may be less candid than they would otherwise have been.<sup>5</sup>
24. The public interest test in section 35(1)(b) is narrow, in that it is directed toward the impact release would have on an agency's ability to obtain the same type of information in the future. The exemption does not permit me to have regard to other matters, such as any public interest in favour of release, or the extent to which the Applicant's personal interest in the document would be served by granting access to the documents.
25. The Agency's statutory functions require it to administer and ensure compliance with certain legislation and local laws. I accept the Agency relies on information provided by third parties on a voluntary or unsolicited basis, often in the form of a complaint, to carry out its regulatory and enforcement functions. Such information provided to the Agency will, by its very nature and context, generally be sensitive and confidential.
26. In my opinion, the release of information provided in confidence would render the Agency's complaints process less effective. I am of the view, if details of complaints and complainants were to be routinely released under FOI, individuals would be deterred from providing complaint related information to the Agency. This impairment goes beyond a trifling or minimal impairment.<sup>6</sup> I consider this to be a significant and detrimental outcome that would be detrimental to the Agency's ability to fully investigate complaints and perform its regulatory and enforcement statutory functions.
27. I appreciate the Applicant feels aggrieved that the complaints were made to the Agency and wishes to obtain further information concerning the complaint. However, in my view, there is an essential public interest in ensuring the confidentiality of complainants in such circumstances that outweighs any interest the Applicant has in the obtaining access to the documents. In any event, I note that the Agency has informed the Applicant of the nature of the complaints made against the Applicant, and is affording the Applicant the opportunity to respond to the substance of those complaints.
28. On the information before me, I am satisfied disclosure of documents 7 – 10 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. As such, I have determined that documents 7 – 10 are exempt in full.
29. In light of my decision to refuse access in full to Document 10, it is not necessary for me to consider the additional exemption being section 33(1) the Agency applied to this document.

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<sup>5</sup> *Smeaton v Victorian WorkCover Authority* [2012] VCAT 1549, approving *Birnbauer v Inner and Eastern Health Care Network* [1999] 16 VAR 9.

<sup>6</sup> *Ryder v Booth* [1985] VR 869.

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

30. 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.
31. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'<sup>7</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>8</sup>
32. I have considered the information the Agency deleted from Document 6 as irrelevant. I agree it falls outside the scope of the Applicant's request because it relates to Agency's staff other than those specified in the request. Furthermore, the Applicant has indicated they are not seeking personal affairs information of third parties. The personal affairs information in Document six is therefore irrelevant and is to remain deleted.

### **Conclusion**

33. On the information available, I am satisfied the exemption in section 35(1)(b) applies to Documents 7, 8, 9 and 10. I have decided to refuse access to those documents in full.
34. As it is practicable to edit Document 6 to delete irrelevant personal affairs information, I have determined to grant access to that document in part.
35. The Schedule of Documents in **Annexure 1** sets out a summary of my decision with respect to each document.

### **Review rights**

36. 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>9</sup>
37. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.<sup>10</sup>
38. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.<sup>11</sup>
39. 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.
40. 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>12</sup>

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<sup>7</sup> *Mickelborough v Victoria Police (General)* [2009] VCAT 2786 [31]; *The Herald and Weekly Times Pty Limited v The Office of the Premier (General)* [2012] VCAT 967 at [82].

<sup>8</sup> *Honeywood v Department of Human Services* [2006] VCAT 2048 [26]; *RFJ v Victoria Police FOI Division (Review and Regulation)* [2013] VCAT 1267 at [140], [155].

<sup>9</sup> The Applicant in section 50(1)(b) and the Agency in section 50(3D).

<sup>10</sup> Section 52(5).

<sup>11</sup> Section 52(9).

<sup>12</sup> Sections 50(3F) and (3FA).

**When this decision takes effect**

41. 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]	City of Greater Geelong letter to [business name]	1	Released in full	Not subject to review	N/A
2	[Date]	City of Greater Geelong letter to [named person]	1	Released in full	Not subject to review	N/A
3	[Date]	[Business name] letter to Applicant	3	Released in full	Not subject to review	N/A
4	[Date]	Planning Investigations Officers Inspection Report	2	Released in full	Not subject to review	N/A
5	[Date]	Email from [business name] to [named person]	2	Released in full	Not subject to review	N/A
6	[Date]	Request for service complaint	7	Released in part Section 25	Release in part Section 25 Personal affairs information is to remain deleted as irrelevant and outside scope of the review.	Section 25: I consider the personal affairs information contained in the email correspondence is outside the scope of the Applicant's request because it relates to Agency's staff other than those specified in the request. As the Applicant has indicated they are not seeking personal affairs information of third parties as part of this review, the names are deleted as irrelevant.
7	[Date]	CCTV images	7	Refused in full Section 35(1)(b)	Refuse in full Section 35(1)(b)	Section 35(1)(b): I am satisfied the information relating to the complainant was provided to the Agency with an expectation that confidentiality would be maintained.

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
						In my opinion, the release of this information would render the Agency's complaints process ineffective. If a complainants' details were to be routinely released under FOI, individuals would be deterred from providing complaint related information to the Agency. This would impair the Agency's ability to fully investigate complaints and perform its regulatory and enforcement statutory functions. Accordingly, this type of information is exempt under section 35(1)(b).
8	[Date]	CCTV images	7	Refused in full Section 35(1)(b)	Refuse in full Section 35(1)(b)	Section 35(1)(b): Please refer to my comments in Document 7 above.
9	[Date]	File note – CCTV images	33	Refused in full Section 35(1)(b)	Refuse in full Section 35(1)(b)	Section 35(1)(b): Please refer to my comments in Document 7 above.
10	[Date]	Complaint	3	Refused in full Sections 33(1), 35(1)(b)	Refuse in full Section 35(1)(b)	Section 35(1)(b): Please refer to my comments in Document 7 above.
11	Various	Attachment 4 – aerial images from [date range] with Inspection Report and diary note	12	Released in full	Not subject to review	N/A