

## Notice of Decision and Reasons for Decision

---

Applicant:	'BF1'
Agency:	Department of Environment, Land, Water and Planning
Decision date:	10 March 2020
Exemption considered:	Section 33(1)
Citation:	'BF1' and Department of Environment, Land, Water and Planning (Freedom of Information) [2020] VICmr 52 (10 March 2020)

---

FREEDOM OF INFORMATION – municipal monitor report – response from councillors – personal opinions – 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 is the same as the Agency's decision.

I am satisfied the documents are exempt under section 33(1). As it is not practicable to edit the documents to delete irrelevant information in accordance with section 25, I have determined to refuse access to the documents in full.

My reasons for decision follow.

**Joanne Kummrow**  
Public Access Deputy Commissioner  
10 March 2020

## Reasons for Decision

### Background to review

1. The Applicant made a request to the Agency for access to documents. Following consultation with the Agency, the request was for:

Documents relating to the [location] Shire. Sent to the minister for local government via email on or about [date] 1. The collective response to the Municipal monitors report, including the Good governance action plan, from [specified number of] councillors as well as any individual responses from these councillors. 2. The response to the Municipal monitors report from lawyers acting on behalf of this group of councillors. 3. Councillor [name] response to the Municipal monitors report.

2. In its decision, the Agency identified six documents falling within the terms of the Applicant's request. It decided to refuse access to the documents in full.
3. I note the request relates to a publicly available report 'Municipal Monitor Report [redacted]'. I further note, under the *Local Government Act 1989* (Vic), a councillor may respond to such reports and the Applicant's request appears to relate to such responses.

### Review

4. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
5. In their review application, the Applicant advised:

I would be happy for the release of just one document, 'Councillors (group) response to the monitors report' there would be no personal information in this document.
6. In my view, the Applicant seeks access to two documents falling within in scope of their FOI request: Document 1, is a submission from a legal firm made on behalf of [the] named councillors; and Document 2 is a document titled 'councillor submission' and is authored by [the] named councillors.
7. I have examined copies of the documents subject to review.
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;
  - (b) the Applicant's review application; and
  - (c) the Agency's submission dated 23 January 2020.
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 section 33(1) to refuse access to the documents. The Agency's decision letter sets out the reasons for its decision.

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

12. 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; and
  - (b) such disclosure would be 'unreasonable'.
13. 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 such information may be reasonably determined.<sup>1</sup> Personal affairs information of a third party can also include:
  - (a) personal affairs, whether or not there is knowledge in the public arena about a person's private life or their personal affairs;<sup>2</sup> and
  - (b) a third party's opinion or observations about another person's conduct.<sup>3</sup>
14. The concept of 'unreasonable disclosure' involves balancing the public interest in the disclosure of official information with the interest in protecting a third party's personal privacy in the circumstances of a matter.
15. 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.<sup>4</sup> However, I do not consider this is a relevant factor in the circumstances.
16. In deciding whether disclosure of a document would involve the unreasonable disclosure of a third party's personal affairs information, an agency must notify that person an FOI request has been received for documents containing their personal information and seek their views as to disclosure except where:
  - (a) notification would be reasonably likely to endanger the life or physical safety of a person, or cause them undue distress, or is otherwise unreasonable in the circumstances;
  - (b) notification would be reasonably likely to increase the risk to the safety of a person experiencing family violence; or
  - (c) it is not practicable to do so.
17. The Agency advised it attempted to consult with third parties, but was unable to contact them.

*Would disclosure of the documents involve the disclosure of personal affairs information?*

18. Information in the documents was provided by [specified number of] councillors in response to a municipal monitor report. The now public report, is critical of the councillors and their written response explains their views in response to a broad range of topics relating to municipal governance and specific decisions taken while the councillors were on the council.

---

<sup>1</sup> Section 33(9).

<sup>2</sup> *Re Gunawan and the Department of Education* (unreported) VCAT, Davis SM, 15 December 1998.

<sup>3</sup> *Richardson v Business Licensing Authority* [2003] VCAT 1053, cited in *Davis v Victoria Police (General)* [2008] VCAT 1343 at [43], *Pritchard v Victoria Police (General)* [2008] VCAT 913 at [24], *Mrs R v Ballarat Health Services (General)* [2007] VCAT 2397 at [13].

<sup>4</sup> Section 33(2A).

19. Document 1 was prepared by lawyers representing the [specified number of] councillors and contains the advice and advocacy of those lawyers. However, given this information is so intertwined with information and the personal views of the councillors, I do not consider I can separate those two sources of information.
20. I also note that the documents contain the collective view of a group of people. However, given the identity of those people is known, I consider it would be likely that, given some of the specific circumstances described in the documents, that individuals could be identified.
21. In *Thompson v Department of Infrastructure*,<sup>5</sup> the Victorian Civil and Administrative Tribunal (**VCAT**) accepted persons, such as councillors or politicians, are entitled to have their personal views and are entitled to communicate information relating to their personal affairs. However, VCAT noted that, whether the exemption applies depends on the specific circumstances of each matter and in that case, the Tribunal decided the information subject to review did not relate to the councillor's personal affairs.
22. In that case, the document in dispute was an email from a councillor to an adviser to the Minister for Planning. The email contained the councillor's views on a contentious local issue. VCAT found information in the email did not relate to the councillor's personal affairs as the councillor's views related to Council business, were expressed by the councillor in their capacity as a councillor on a document that, on its face, emanated from the Council, and was forwarded to the responsible Minister.
23. In the circumstances of this matter, while the information relates to the councillors' performance, it does not relate to official council business, rather, it relates to their personal views on their conduct as councillors.
24. Therefore, even if the names of the councillors were removed from the documents, they would still contain the following personal affairs information of persons other than the Applicant:
- (a) information from which individuals could be identified; and
  - (b) the personal views, experiences and opinions of the relevant individuals.
25. In determining whether disclosure of personal affairs information in the documents would be unreasonable, I have considered the following factors:
- (a) The nature of the personal affairs information and the circumstances in which the information was obtained  
  
The information was provided to the Agency by councillors following a report into their conduct. I consider this information to be sensitive and provided in confidence to the Agency by their legal representative.
  - (b) The Applicant's interest in the information, and whether their purpose for seeking the information is likely to be achieved  
  
The FOI Act provides a general right of access that can be exercised by any person, regardless of their motive or purpose for seeking access to a document. However, the reasons why an applicant seeks access to a document is a relevant consideration in determining whether disclosure would be unreasonable.<sup>6</sup>

---

<sup>5</sup> [2003] VCAT 44.

<sup>6</sup> *Victoria Police v Marke* [2008] VSCA 218 at [104].

In their review request, the applicant states:

The monitors report has been made public and I believe that it is only fair to be able to read the councillors response so that both sides of the issue have a fair representation with the ratepayers of [location].

I note the monitor's report is publicly available. However, I consider the councillors' response prior to the public release of that document is in the nature of a private document. In the circumstances, I am satisfied the relevant persons would expect that, in the interests of them providing a full and frank response to the Municipal Monitor, that the document as a whole would remain confidential.

(c) The likelihood of further disclosure of information, if released

The nature of disclosure under the FOI Act is unconditional and unrestricted, which means an applicant is free to disseminate widely or use a document as they choose.<sup>7</sup> Accordingly, I must consider the likelihood and potential effects of further dissemination of a third party's personal affairs information, if released.

As set out above, the Municipal Monitor's report is publicly available and so it appears they believe the councillor's response should also be released.

In the circumstances, I consider it is reasonably likely the document would be further disseminated if disclosed under the FOI Act.

(d) Whether any public interest would be promoted by release of the information

I acknowledge the views and concerns expressed by the Applicant regarding councillor conduct. However, I do not consider there is a public interest in disclosure of the documents.

Rather, there is a public interest in maintaining the confidentiality of such responses where doing so ensures a person's right to be afforded procedural fairness when being investigated by the Municipal Monitor. Further, there is a public interest in such a person being able to respond to allegations in a full and candid way without concern their response will be disclosed under the FOI Act.

(e) Whether the individuals to whom the information relates object, or would be likely to object, to the release of the information

I note the Agency has attempted to consult with those councillors concerned, however was unable to contact them. There is no information before me as to whether the persons concerned would object to the release of their information. However, I consider that, should they wish to make it public then as it is their information, they are able to do so.

(f) Whether the disclosure of information would, or would be reasonably likely to endanger the life or physical safety of any person<sup>8</sup>

There is no information before me to suggest this is a relevant factor in this case.

26. Having considered the above factors, I am of the view the interest in protecting the personal privacy of the relevant third parties outweighs the Applicant's interest in disclosure of the documents subject to review.

---

<sup>7</sup> *Victoria Police v Marke* [2008] VSCA 218 at [68].

<sup>8</sup> Section 33(2A).

27. Accordingly, I am satisfied the documents are exempt under section 33(1).

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

28. Section 25 requires an agency to grant access to an edited copy of a document when it is practicable for the agency to delete exempt or irrelevant information and the applicant agrees to receiving such a copy.

29. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'<sup>9</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>10</sup>

30. I have considered the effect of deleting the exempt personal affairs information from the documents in accordance with section 25. I am satisfied it is not practicable to do so as it is intertwined with non-exempt information such that deleting the exempt information would render the documents meaningless.

#### ***Conclusion***

31. On the information available, I am satisfied the documents are exempt under section 33(1).

32. As it is not practicable to edit the documents to delete irrelevant information in accordance with section 25, I have determined to refuse access to the documents in full.

#### ***Review rights***

33. If either party to this review is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.<sup>11</sup>

34. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.<sup>12</sup>

35. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.<sup>13</sup>

36. 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.

37. 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>14</sup>

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

38. 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.

---

<sup>9</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>10</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].

<sup>11</sup> The Applicant in section 50(1)(b) and the Agency in section 50(3D).

<sup>12</sup> Section 52(5).

<sup>13</sup> Section 52(9).

<sup>14</sup> Sections 50(3F) and (3FA).