

## Notice of Decision and Reasons for Decision

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Applicant:	'BM8'
Agency:	Mount Alexander Shire Council
Decision date:	28 April 2020
Exemption considered:	Section 35(1)(b)
Citation:	'BM8' and Mount Alexander Shire Council ( <i>Freedom of Information</i> ) [2020] VICmr 123 (28 April 2020)

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FREEDOM OF INFORMATION – council documents – complaint made to council – letter of complaint – customer service inquiry – information obtained in confidence – disclosure contrary to the public interest

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 in that I have decided to release additional information in the documents.

I am satisfied the documents are exempt under section 35(1)(b).

Where I am satisfied it is practicable for the Agency to delete exempt information in the documents in accordance with section 25, 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  
28 April 2020

## Reasons for Decision

### Background to review

1. On [date], the Applicant made a request to the Agency for access to the following documents:

All hardcopy and electronic documents from and to and about either [the Applicants] and [the Agency between a specified timeframe]. This would include letters, working notes, emails and who has accessed these documents.
2. The Agency consulted with the Applicant via telephone on the basis it proposed to refuse to grant access to the documents under section 25A(1).
3. Following consultation with the Applicant, the Agency conducted a search of its electronic document management system using email addresses specified by the Applicant on [date].
4. In its decision, the Agency located five emails falling within the terms of the Applicant's request and determined to release one document in full and four documents in part. The Agency also refused access to a 'letter of complaint' under section 33(1). During this review, the Agency clarified the 'letter of complaint' consists of an email and a 'customer service inquiry' request.
5. In its decision, the Agency advised the Applicant it intended to continue processing the request, as follows:

With regard to still providing documents as per your original request, Council is willing to conduct a search in time increments, such as letters and emails (redacted where applicable) received and sent by Council in six months beginning from [year] and provide to you access / copies on a monthly basis.
6. The Applicant continued to engage with the Agency in relation to their request and has since narrowed the scope of their request.

### Review

7. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
  8. During this review, the Applicant advised they seek review of 'the letter of complaint' only. Accordingly, this review relates to the customer service request (**Document 1**) and an email (**Document 2**).
  9. I have examined copies of these documents.
  10. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
  11. 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 submissions dated [date] and [date] and correspondence with the Applicant during this review;
    - (c) information provided by the Agency during this review; and
    - (d) correspondence from the Agency during this review.
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12. 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.

### **Applicant's submission**

13. In support of their review application, the Applicant provided two submissions outlining their reasons for seeking access to the documents.
14. In summary, on [date], the Applicant received a letter from the Agency advising it had come to the Agency's attention the Applicant had constructed a [shed] within 5 metres of their property boundary and required the Applicant to submit a planning permit application (**permit**).
15. The Applicant submits they previously sought verbal advice from an Agency building inspector, who advised a permit was not required. The Applicant was not able to recover an email sent to the Agency in which the Applicant advised of the building inspector's verbal advice.
16. By telephone conversation on [date], the Agency advised the Applicant the issue came to its attention through a complaint. The Applicant is of the view the complaint was submitted by [a third party] with whom they have been in an ongoing dispute.
17. The Applicant seeks access to the complaint in order to prepare for any potential objections that may be raised in relation to their permit application for their [shed]. Further, the Applicant advised they seek access to the complaint to:

...address the issues of the construction of the [shed] and why the complaint was left until completion, given the construction was in progress over several years, but also to determine what measures these people are prepared to go to in undermining us, our safety and well-being.
18. The Applicant is further concerned the Agency has not required other persons in the municipality to obtain planning permits, despite the Agency's advice a permit was not required for the construction.

### **Review of exemptions**

19. In undertaking a review under section 49F, I am required by section 49P to make a fresh or new decision. This means my review does not involve determining whether the Agency's original decision is correct, but rather I am required to ensure my fresh decision is the 'correct or preferable decision'.<sup>1</sup> This involves ensuring my decision is correctly made under the FOI Act and any other relevant applicable law in force at the time of my decision.
20. While I note the Agency relied on section 33(1) to exempt the documents, having reviewed the documents, I have determined they are exempt under section 35(1)(b).

### ***Section 35(1)(b) – Documents containing material obtained in confidence***

21. 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.

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<sup>1</sup> *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577 at 591.

*Was the information or matter communicated in confidence?*

22. When determining whether the information was communicated in confidence, it is necessary to consider the position from the perspective of the communicator, noting confidentiality can be expressed or implied from the circumstances of a matter.<sup>2</sup>
23. While there is nothing on the face of the email to indicate the information was communicated in confidence, a document need not be marked 'confidential' for the content to be considered information communicated in confidence.<sup>3</sup>
24. Having reviewed the document and the nature of the information provided to the Agency by a third party, I am satisfied the information was communicated to the Agency in circumstances in which confidentiality can reasonably be implied, based on the nature and context of the information.
25. Therefore, I am satisfied disclosure of the information would divulge information communicated to the Agency in confidence.

*Would disclosure be contrary to the public interest?*

26. Section 35(1)(b) also requires consideration of whether the Agency would be impaired from obtaining similar information in the future if the documents were to be disclosed under the FOI Act.
27. This means I must be satisfied others in the position of the communicator would be reasonably likely not to provide similar information to the Agency in the future if the information were to be disclosed.
28. The exemption under section 35(1)(b) will not be made out if the evidence goes no further than the people involved would be somewhat less candid than they otherwise might be in providing information in the future.<sup>4</sup>
29. 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.
30. The Agency's statutory functions require it to administer and ensure compliance with certain legislation and local laws. As such, it has statutory regulatory and enforcement functions, including in relation to building and planning permits.
31. 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.
32. 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>5</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 functions.

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<sup>2</sup> *XYZ v Victoria Police* [2010] VCAT 255 at [265].

<sup>3</sup> *Williams v Victoria Police* [2007] VCAT 1194 at [75].

<sup>4</sup> *Smeaton v Victorian WorkCover Authority* [2012] VCAT 1549 approving *Birnbauer v Inner and Eastern Health Care Network* (1999) 16 VAR 9.

<sup>5</sup> *Ryder v Booth* [1985] VR 869.

33. I appreciate the Applicant feels aggrieved the complaints were made to the Agency and wishes to obtain further information in order to respond to or address any concerns raised. However, I consider there is an essential public interest in ensuring the confidentiality of the source of complaints in such circumstances, which outweighs the Applicant's personal interest in the obtaining access to the documents.
34. Accordingly, I am satisfied the documents are exempt under section 35(1)(b).
35. The Schedule of Documents in **Annexure 1** sets out my decision with respect to each document.

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

36. Section 25 requires an agency to grant access to an edited copy of a document when it is practicable to delete exempt or irrelevant information and the applicant agrees to receiving such a copy.
37. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'<sup>6</sup> and the effectiveness of the deletions. Where deletions would render a document meaningless, they are not 'practicable', and release of the document is not required under section 25.<sup>7</sup>
38. I have considered the effect of deleting exempt information from the documents in accordance with section 25. I am satisfied it is practicable to delete the exempt information from Document 1, as to do so would not require substantial time and effort, and the edited document would retain meaning. However, I am not satisfied it would be practicable to delete exempt information from Document 2, as it would render the document meaningless.

#### ***Conclusion***

39. On the information before me, I am satisfied the documents are exempt under section 35(1)(b).
40. As I am satisfied it is practicable to delete exempt information from Document 1, I have determined to grant access to this document in part. However, as I am not satisfied it is practicable to delete exempt information from Document 2, I have determined to refuse access to this document in full.

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

41. 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>8</sup>
42. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.<sup>9</sup>
43. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.<sup>10</sup>
44. 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.

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<sup>6</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>7</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>8</sup> The Applicant in section 50(1)(b) and the Agency in section 50(3D).

<sup>9</sup> Section 52(5).

<sup>10</sup> Section 52(9).

45. 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>11</sup>

***When this decision takes effect***

46. 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>11</sup> Sections 50(3F) and (3FA).

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
1.	[Date]	Planning Enquiry / Planning Permits – Service Request	1	Refused in full Section 35(1)(b)	Release in part Section 35(1)(b), 25  The document is to be released to the Applicant with the following information deleted as it is exempt under section 33(1): <ul style="list-style-type: none"> <li>the fifth word next to the heading 'Detail'.</li> </ul>	Section 33(1): I am satisfied it would be contrary to the public interest to disclose the document as outlined above in the Notice of Decision. Accordingly, this document is exempt under section 35(1)(b).  Section 25: I am satisfied it is practicable for the Agency to edit the document to remove exempt information in accordance with section 25.
2.	[Date]	Email	3	Refused in full Section 33(1)	Refused in full Section 35(1)(b)	Section 35(1)(b): See comment for Document 1.  Section 25: I am not satisfied it is practicable for the Agency to edit the document to remove exempt material, as it would render the document meaningless.