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## Notice of Decision and Reasons for Decision

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Applicant:	'CG6'
Agency:	Mildura Rural City Council
Decision date:	2 November 2020
Exemptions considered:	Sections 31(1)(a), 31(1)(d), 33(1), 35(1)(b), 30(1)
Citation:	'CG6' and Mildura Rural City Council ( <i>Freedom of Information</i> ) [2020] VICmr 309 (2 November 2020)

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FREEDOM OF INFORMATION – investigation report – emails – local planning scheme – information provided in confidence – prejudice the proper administration or enforcement of the law – 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 in that I have decided to release additional information in the documents.

I am satisfied the documents subject to review are exempt under sections 31(1)(a), 31(1)(c), 31(1)(d), 33(1) and 35(1)(b) either in full or in part. However, I am not satisfied Document 6 is exempt under section 30(1).

Where I am satisfied it is practicable to delete exempt and irrelevant information from the documents in accordance with section 25, I have determined to release the document in part. However, where the removal of such information would render a document meaningless, I have determined to refuse access to the document in full.

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

2 November 2020

## Reasons for Decision

### Background to review

1. In consultation with the Agency, the Applicant made a request for access to the following documents:  

Information and correspondence surrounding the issue of breach of [location] planning scheme file [file reference] ...
2. The Agency identified eight documents falling within the terms of the Applicant's request and granted access to four documents in full and refused access to four documents in full under sections 30(1), 31(1), 32(1) and 33(1). The Agency's decision letter sets out the reasons for its decision.

### Review

3. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
4. During the review, the Agency advised it no longer relies on section 32(1) to refuse access to Documents 3 and 6. However, it maintains the documents are exempt in full as the Applicant did not agree to receive edited copies of the documents.
5. After consultation with OVIC staff, the Applicant advised they are agreeable to receiving edited 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.
8. I have examined copies of the documents subject to review.
9. 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.
10. I have also considered Parliament's intention that the FOI Act be interpreted so as to further the object of the Act and any discretions conferred by the Act must be exercised, as far as possible, so as to facilitate and promote the disclosure of information in a timely manner and at the lowest reasonable cost.
11. In conducting a review under section 49F of the FOI Act, section 49P requires that I make a new or 'fresh decision'. Therefore, my review does not involve determining whether the Agency's decision is correct, but rather requires my fresh decision to be 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 making my fresh decision.

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

## Review of exemptions

### **Section 31(1) – Law enforcement documents**

12. The Agency’s decision did not distinguish what exemptions under section 31(1) it seeks to rely on. Nonetheless, having reviewed the documents and information provided by the Agency during the review, I consider the Agency seeks to rely on the exemption in sections 31(1)(a), 31(1)(d) and 31(1)(c) to refuse access to documents.

### **Section 31(1)(a)**

13. Section 31(1)(a) provides a document is an exempt document if its release would, or would be likely to, prejudice the investigation of a breach or possible breach of the law or prejudice the enforcement or proper administration of the law in a particular instance;
14. ‘Reasonably likely’ means there is a real chance of an event occurring; it is not fanciful or remote.<sup>2</sup>
15. ‘Prejudice’ means to hinder, impair or undermine and includes actual prejudice as well as impending prejudice.<sup>3</sup>
16. ‘In a particular instance’ does not require a single specific investigation. This phrase can encompass specific, identified aspects of law, administration of law or investigations of breaches or potential breaches of law.<sup>4</sup>
17. The ‘enforcement of the law’ deals with the process of enforcing of the law, whereas the ‘proper administration of the law’ concerns how the law is administered, for example, regulatory, monitoring and compliance activities.<sup>5</sup>

### **Section 31(1)(c)**

18. Subject to section 31, section (1)(c) provides a document is an exempt document if its disclosure would, or would be reasonably likely to, disclose or enable a person to ascertain the identity of a confidential source of information in relation to the enforcement or administration of the law.
19. Further, in the circumstances of this matter, where a document discloses information provided by a third party to the Agency, section 35(1)(b) should also be considered as an appropriate exemption to this information. My review of section 35(1)(b) is set out below.

### **Section 31(1)(d)**

20. Section 31(1)(d) provides a document is an exempt document if its disclosure would, or would be reasonably likely to, ‘disclose methods or procedures for preventing, detecting, investigating, or dealing with matters arising out of, breaches or evasions of the law the disclosure of which would, or would be reasonably likely to, prejudice the effectiveness of those methods or procedures’.
21. The exemptions in section 31(1) do not apply to widespread and well known methods and procedures.<sup>6</sup>

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<sup>2</sup> *Bergman v Department of Justice Freedom of Information Officer* [2012] VCAT 363 at [65], quoting *Binnie v Department of Agriculture and Rural Affairs* [1989] VR 836.

<sup>3</sup> *Ibid*, *Bergman* at [66], referring to *Sobh v Police Force of Victoria* [1994] VicRp 2; [1994] 1 VR 41 (Nathan J) at [55].

<sup>4</sup> *Cichello v Department of Justice (Review and Regulation)* [2014] VCAT 340 at [24].

<sup>5</sup> *Cichello v Department of Justice* [2014] VCAT 340 at [23], referring to *JCL v Victoria Police* [2012] VCAT 1060 at [28]; *Croom v Accident Compensation Commission* (1989) 3 VAR 441, affirmed on appeal [1991] 2 VR 322.

<sup>6</sup> *XYZ v Victoria Police* [2010] VCAT 255 at [177].

22. The Schedule of Documents in **Annexure 1** sets out my decision in relation to section 31(1).

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

23. 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?*

24. When determining whether information was communicated by a person to an agency in confidence, it is necessary to consider the position from the perspective of the communicator.<sup>7</sup>

25. Confidentiality can be expressed or implied having regard to the particular circumstances of a matter.<sup>8</sup>

26. Having carefully considered the content and context of the document, I am satisfied the third party who communicated information to the Agency did so on a voluntary basis and in circumstances where confidentiality could reasonably be implied.

*Would disclosure be contrary to the public interest in that it would be reasonably likely to impair the ability of the Agency to obtain information of a similar nature in the future?*

27. In considering the application of section 35(1)(b), the public interest test is narrow and does not permit me to have regard to matters, such as any public interest factors in favour of release, or the extent to which an applicant's personal interest in the document would be served by being granted access to the document. Instead, the test is restricted to matters that address the impact disclosure will have on the Agency and its ability to receive information of a similar nature in the future if a document was to be disclosed under the FOI Act.

28. The Agency's statutory functions require it to investigate sources of possible non-compliance with the relevant planning policy framework. I accept the Agency relies on information provided by third parties on a voluntary or unsolicited basis, often in the form of complaints or confidential disclosure, to carry out its regulatory and enforcement functions. Such information provided to the Agency will, by its very nature, be sensitive and confidential.

29. I acknowledge the Applicant's interest in obtaining access to the information. However, I consider the need to protect the ability of the Agency to receive information that assists the administration and enforcement of the local planning scheme is an essential public interest that limits disclosure of information under the FOI Act.

30. In the context of the Agency regulatory functions, I consider if details of complaints and disclosures were to be routinely released under the FOI Act, individuals would be deterred from providing similar information to the Agency in the future. I am satisfied this would impair the efficacy of the Agency's regulatory and enforcement functions regarding the local planning scheme.

31. Accordingly, I am satisfied the information communicated to the Agency by a third party is exempt under section 35(1)(b).

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<sup>7</sup> Ibid at [265].

<sup>8</sup> Ibid.

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

32. 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>9</sup> and
  - (a) such disclosure would be 'unreasonable'.
33. 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>10</sup>
34. The concept of 'unreasonable disclosure' involves balancing the public interest in the disclosure of official information with the personal interest in privacy in the particular circumstances of a matter.
35. Whether the release of personal affairs information would be unreasonable must be considered taking into account the particular circumstances, having regard to any matter that may 'relevantly, logically, and probatively' bear upon whether disclosure of personal affairs information of any person would be unreasonable in its own context.<sup>11</sup>
36. 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>12</sup> On the information before me, I am not satisfied this is a relevant factor.
37. The Agency relied on section 33(1) to exempt the names, position titles, telephone numbers and email addresses of Agency officers and third parties.
38. The Agency did not consult with the individuals named in the documents.
39. Having considered the documents and the circumstances of this matter, I am satisfied it would not be unreasonable to release the names and position titles of the Agency officers. I am of the view this information is not particularly sensitive as it relates solely to the Agency officers performing their professional duties and does not relate to matters concerning their personal or private lives.
40. However, in all other instances, I am satisfied it would be unreasonable to release the personal affairs information of third parties in the documents as:
- (a) The personal affairs information relates to an investigation. I consider the circumstances in which it was obtained are sensitive.
  - (b) In some circumstances, it is clear the information was provided to the Agency with an expectation of confidence.
  - (c) The information is not publicly available.
  - (d) The person to whom the information relates would be reasonably likely object to its release under the FOI Act.
41. Accordingly, I am satisfied certain information in the documents is exempt under section 33(1).

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<sup>9</sup> Sections 33(1) and (2).

<sup>10</sup> Section 33(9).

<sup>11</sup> *Victoria Police v Marke* [2008] VSCA 218 at [94].

<sup>12</sup> Section 33(2A).

42. My decision in relation section 33(1) is set out in the Schedule of Documents in **Annexure 1**.

**Section 30(1)**

43. Section 30(1) has three requirements:

- (a) the document must disclose 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;
- (a) such matter must be 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
- (b) disclosure of the matter would be contrary to the public interest.

44. The exemption does not apply to purely factual material in a document.<sup>13</sup>

45. In determining if disclosure of the document would be contrary to the public interest, I must consider all relevant factors remaining mindful the object of the FOI Act is to facilitate and promote the disclosure of government information. In this case, I have given weight to the following relevant factors:<sup>14</sup>

- (a) the right of every person to gain access to documents under the FOI Act;
- (b) the degree of sensitivity of the issues discussed in the document and the broader context giving rise to the creation of a document;
- (c) the stage of a decision or status of policy development or a process being undertaken at the time a communication was made;
- (d) the public interest in the community being better informed about the way in which the Agency or Minister carries out statutory functions, including deliberative, consultative and decision-making processes and whether the underlying issues require greater public scrutiny; and
- (e) the impact disclosure would have on the efficient and economical conduct of government, in particular, the deliberative processes of high levels of government in relation to sensitive issues, and the preservation of confidentiality to promote the giving of full and frank advice.<sup>15</sup>

46. My decision in relation section 30(1) is set out in the Schedule of Documents in **Annexure 1**.

**Deletion of exempt or irrelevant information**

47. 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.

48. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'<sup>16</sup> and the effectiveness of the deletions. Where

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<sup>13</sup> Section 30(3).

<sup>14</sup> *Hulls v Victorian Casino and Gambling Authority* (1998) 12 VAR 483.

<sup>15</sup> *Secretary, Department of Justice v Osland* [2007] VSCA 96.

<sup>16</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].

deletions would render a document meaningless, they are not 'practicable', and release of the document is not required under section 25.<sup>17</sup>

49. I have considered whether it is practicable to provide the Applicant with an edited copy of the documents with exempt information deleted in accordance with section 25. Where I am satisfied it is practicable to do so, I have determined to release the document in part. However, where the removal of such information would render a document meaningless, I have determined to refuse access to the document in full.

### **Conclusion**

50. On the information before me, I am satisfied certain documents are exempt under sections 31(1)(a), 31(1)(c), 31(1)(d) and 35(1)(b) either in full or in part. However, I am not satisfied Document 6 is exempt under section 30(1).
51. Although I am satisfied certain personal affairs information in the documents is exempt under section 33(1), I am not satisfied it applies in each instance.
52. Where I am satisfied it is practicable to delete exempt and irrelevant information from the documents in accordance with section 25, I have determined to release those documents in part. However, where the removal of such information would render a document meaningless, I have determined to refuse access to the document in full.
53. The Schedule of Documents in **Annexure 1** sets out my decision in relation to each document.

### **Review rights**

54. 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>18</sup>
55. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.<sup>19</sup>
56. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.<sup>20</sup>
57. 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.
58. 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>21</sup>

### **Third party review rights**

59. As I have determined to release documents that contain the personal affairs information of individuals other than the Applicant, if practicable, I am required to notify those third parties of their right to seek review by VCAT of my decision within 60 days from the date they are given notice.<sup>22</sup>

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<sup>17</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>18</sup> The Applicant in section 50(1)(b) and the Agency in section 50(3D).

<sup>19</sup> Section 52(5).

<sup>20</sup> Section 52(9).

<sup>21</sup> Sections 50(3F) and (3FA).

<sup>22</sup> Sections 49P(5), 50(3) and 52(3).

60. In this case, I am satisfied it is practicable to notify the relevant third parties about their review rights and confirm they will be notified of my decision on the date of decision.

***When this decision takes effect***

61. Accordingly, my decision does not take effect until the third parties' 60 days review period expires, or if an application to VCAT is made, until the VCAT proceeding is concluded.



Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
1.	[date]	Letter to Applicant	10	Released in full	Not subject to review	
2.	[date]	Letter to Applicant	10	Released in full	Not subject to review	
3.	[date]	Investigation Report	12	Refused in full Sections 30(1), 31(1)(a), 31(1)(d), 33(1)	Release in part Sections 31(1)(a), 31(1)(d), 25	<p>The Agency has withdrawn its reliance on section 32(1), previously applied to refuse access to the document in full.</p> <p><b>Sections 31(1)(a) and (d):</b> I consider the proper administration of the law includes the Agency's regulatory, monitoring and compliance activities in the context of investigating possible breaches of its planning scheme. Having read the exempted information, I also consider the functions, methods and procedures associated with breach investigations are not widespread or commonly known.</p> <p>On the information before me, I am satisfied disclosure would prejudice the effectiveness of those methods and assessments, which are not widely known, and would be reasonably likely to adversely affect the ability of Agency officers to investigate such concerns in the future. Accordingly, I am satisfied the information exempted by the Agency under section 31(1) is exempt under sections 31(1)(a) and 31(1)(d).</p> <p><b>Section 33(1):</b> For the reasons set out in the Notice of Decision above, I am satisfied it</p>

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
						would not be unreasonable to release the names and position titles of Agency officers in the document.  <b>Section 25:</b> I am satisfied it is practicable to release a copy of the document with exempt information deleted in accordance with section 25 as to do so would not render the document meaningless.
4.	[date]	Emails	8	Refused in full Sections 31(1)(c), 30(1), 33(1)	<b>Refuse in full</b> Sections 31(1)(c), 35(1)(b), 33(1)	<b>Section 31(1)(c):</b> I am satisfied the document contains information that would directly or indirectly identify a confidential source of information provided in relation to the enforcement and administration of the law.  <b>Section 35(1)(b):</b> For the reasons set out in the Notice of Decision above, I am satisfied information communicated by a third party to the Agency is exempt under section 35(1)(b).  <b>Section 33(1):</b> For the reasons set out in the Notice of Decision, I am satisfied it would be unreasonable to release the personal affairs information of third parties in the document.  <b>Section 25:</b> I am satisfied it is not practicable to release an edited copy of the document with exempt information deleted in accordance with section 25 as to do so would render the document meaningless. Accordingly, the document is exempt in full.

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
5.	[date]	Emails	8	Refused in full Sections 31(1)(c), 30(1), 33(1)	Refuse in full Sections 31(1)(c), 35(1)(b), 33(1)	See comments for Document 4.
6.	[date]	Emails	45	Refused in full Sections 30(1), 32(1), 33(1)	Release in part Sections 33(1), 25  Document to be released with emails, and direct telephone numbers removed.	<p>The Agency has withdrawn its reliance on section 32(1), previously applied to refuse access to the document.</p> <p><b>Section 30(1):</b> Having carefully examined the email, I am satisfied it is factual in nature and not advice, opinion or recommendation to satisfy the first limb of the exemption. In any case, I am not satisfied the information divulges highly sensitive deliberations that it would disrupt the deliberative processes of the Agency. Therefore, I am satisfied release would not be contrary to the public interest.</p> <p><u>Attachment</u></p> <p>I am satisfied this is purely factual information and is not exempt by virtue of section 30(3).</p> <p>Accordingly, I am satisfied section 30(1) does not apply to the document.</p> <p><b>Section 33(1):</b> For the reasons set out in the Notice of Decision, I am satisfied the name and position title of the agency officer is not exempt, however all other personal affairs information, being direct telephone and</p>

**Annexure 1 – Schedule of Documents**

<b>Document No.</b>	<b>Date of Document</b>	<b>Document Description</b>	<b>Number of Pages</b>	<b>Agency's Decision</b>	<b>OVIC Decision</b>	<b>OVIC Comments</b>
						email information is unreasonable to release and is exempt under section 33(1). <b>Section 25: See comments for Document 3.</b>
7.	[date]	Letter to landowner	10	Released in full	Not subject to review	
8.	[date]	Letter to landowner	10	Released in full	Not subject to review	