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Information Commissioner

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## Notice of Decision and Reasons for Decision

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Applicant:	'CC4'
Agency:	Environment Protection Authority
Decision date:	22 September 2020
Exemption considered:	Section 33(1)
Citation:	'CC4' and Environment Protection Authority ( <i>Freedom of Information</i> ) [2020] VICmr 269 (22 Septmeber 2020)

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FREEDOM OF INFORMATION – personal affairs information – agency officer names – administrative nature of documents – age of documents – agency exercise of statutory functions – public interest in disclosure – disclosure not unreasonable

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 fresh 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 not satisfied the personal affairs information in the documents is exempt under section 33(1).

Accordingly, copies of the documents are to be released to the Applicant in full.

My reasons for decision follow.

**Joanne Kummrow**  
Public Access Deputy Commissioner  
22 September 2020

## Reasons for Decision

### Background to review

1. The Applicant made a request to the Agency seeking access to certain documents:

[Description of] report [reference number] relating to a report of [alleged illegal activity]<sup>1</sup> at [a specific address] I made on or about the [date].

My understanding is that this record was created by [Agency official] some time around this date. I would appreciate a full copy of this record, including any officer allocation/follow-up details.

2. The Agency identified four documents totalling nine pages that fall within the terms of the Applicant's request to which it refused access under section 33(1) in part.
3. The Agency's decision letter sets out the reasons for its decision.

### Review

4. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access to the document in part.
5. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
6. I have examined copies of the documents subject to review and considered all relevant communications received from the parties in relation to this review.
7. 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.
8. I note Parliament's intention the FOI Act must be interpreted so as to further the object of the Act and that 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.

### Review of exemptions

#### ***Section 33(1) – Personal affairs information***

9. 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>2</sup> and
  - (b) such disclosure would be 'unreasonable'.
10. 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.<sup>3</sup>

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<sup>1</sup> [Footnote redacted]

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

<sup>3</sup> Section 33(9).

11. Even where an applicant claims to know the identity of a third party, disclosure of their personal affairs information may still be unreasonable in the circumstances.<sup>4</sup>
12. 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, including a third party's personal affairs information in the document, as they choose.<sup>5</sup>

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

13. The documents released in part by the Agency contain the names of [specified number of] Agency officers who opened, actioned and closed a complaint made to the Agency by Applicant.
14. I am satisfied the documents contain the personal affairs information of individuals other than the Applicant.

*Would release of the personal affairs information be unreasonable in the circumstances?*

15. Consideration of whether disclosure would be unreasonable involves balancing the public interest in the disclosure of official information with the interest in protecting a person's privacy in the particular circumstances of a matter.
16. I note the decision of *Victoria Police v Marke*,<sup>6</sup> in which the Victorian Court of Appeal held there is 'no absolute bar to providing access to documents which relate to the personal affairs of others', and the exemption under section 33(1) 'arises only in cases of unreasonable disclosure' and '[w]hat amounts to an unreasonable disclosure of someone's personal affairs will necessarily vary from case to case'. The Court further held, '[t]he protection of privacy, which lies at the heart of s 33(1), is an important right that the FOI Act properly protects. However, an individual's privacy can be invaded to a lesser or greater degree'.<sup>7</sup>
17. I also note the decision of *Coulson v Department of Premier and Cabinet*,<sup>8</sup> in which the Victorian Civil and Administrative Tribunal (VCAT) held that whether or not an agency staff member's personal affairs information is exempt under section 33(1) must be considered in the context of the particular circumstances of each matter.
18. Therefore, the proper application of section 33(1) involves consideration of 'all matters relevant, logical and probative to the existence of conditions upon which the section is made to depend'.<sup>9</sup>
19. In determining whether disclosure of personal affairs information in the document would be unreasonable in the circumstances, I have considered the following factors:<sup>10</sup>

- (a) The nature of the personal affairs information and the circumstances in which the information was obtained

On the face of the documents, I do not consider the relevant personal affairs information of the Agency officers is particularly sensitive.

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<sup>4</sup> *AB v Department of Education and Early Childhood Development* [2011] VCAT 1263 at [58]; *Akers v Victoria Police* [2003] VCAT 397.

<sup>5</sup> *Victoria Police v Marke* [2008] VSCA 218 at [68].

<sup>6</sup> [2008] VSCA 218 at [76].

<sup>7</sup> [2008] VSCA 218 at [79].

<sup>8</sup> *(Review and Regulation)* [2018] VCAT 229.

<sup>9</sup> [2008] VSCA 218 at [104].

<sup>10</sup> A number of these factors were identified in *Page v Metropolitan Transit Authority* (1988) 2 VAR 243.

The Applicant made a complaint to the Agency, which was recorded in the Agency's complaint management system, actioned and closed.

The personal affairs information in the documents comprises the names of Agency officers in the context of them carrying out their usual professional duties as public sector employees. As such, I consider the personal information in the documents concerns the Agency officers' professional roles rather than their personal or private lives.

More than three years have passed since the complaint was made, received and later closed by the Agency.

There is limited information in the documents regarding the complaint or decision to close the complaint. As such, I consider the documents, while recording a decision to close the complaint, are largely administrative in nature and reflect the Agency officers undertaking their authorised duties in relation to the complaint and exercise of the Agency's functions.

(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 to documents held by an agency, which 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>11</sup>

The Applicant submits they seek access to the documents in full to follow up a report they made to the Agency. In summary, the Applicant is concerned their complaint was not actioned:

The intent of this application therefore is to find out *who* it was that caused the report to not be actioned, which then may illuminate *why* it was not investigated.

I note the Applicant has some knowledge of the Agency and, in my view, is reasonably likely to know one or more of the Agency officers named in the document, given the nature of the complaint made and the officers' roles in the Agency.

On the information before me, I am satisfied the Applicant's stated purpose for seeking access to the personal affairs information in the documents would be likely to be achieved given the Applicant seeks access to the name of the person '*who* it was that caused the report not to be actioned'. Although, as stated above, I note there is limited information in the documents regarding the reasons for the decision to close the complaint and I accept the documents are unlikely to '*illuminate why* it was not investigated'.

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

The Applicant submits there is a significant public interest in the subject matter of their complaint made to the Agency and in the oversight of systems management by Agency staff. Further, denying access to the personal affairs information of Agency staff in the documents will reduce the likelihood of similar complaints being made to the Agency in the future.

The reasons why an agency determines whether or not to take further regulatory or enforcement action in relation to a complaint received can be multifaceted and will generally align with the agency's regulatory action policy or compliance and enforcement policy.

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<sup>11</sup> *Victoria Police v Marke* [2008] VSCA 218 at [104].

The Agency provides the following information on its website, which summarises its role as Victoria's environmental regulator:

As an effective environmental regulator, EPA's role is to monitor industry and ensure it complies with the *Environment Protection Act 1970* (the Act) to achieve the environmental outcomes we want for Victoria.

The Act is a framework to protect Victoria's environment. It sets out a series of overarching principles that EPA must consider. EPA, and its authorised officers, are also responsible for ensuring compliance with the *Pollution of Waters by Oils and Noxious Substances Act 1986*.

The compliance and enforcement policy articulates EPA's approach, method and priorities for ensuring compliance with our Acts and carrying out our compliance and enforcement powers. The policy also identifies many of EPA's enforcement powers, how they differ depending on the severity of the non-compliance, and an explanation of how and when they are used. EPA commits itself to this policy and the principles it establishes.

EPA will balance the use of its influence and enforcement tools to achieve compliance, uphold environmental standards and drive environmental improvement.

Having considered the content and nature of the complaint made and publicly available information, I consider the complaint concerns matters of a serious nature that engaged the Agency's statutory functions under the *Environment Protection Act 1970* (Vic) (**EP Act**).

In such circumstances, I consider there is a public interest in the Agency being transparent and accountable in relation to the exercise of its statutory functions, including decisions made by Agency officers on behalf of the Agency regarding the use or otherwise of the Agency's compliance and enforcement powers under the EP Act.

I accept certain Agency officers named were not the ultimate decision makers in relation to the closure of the complaint. However, while the fact an agency officer is not the responsible decision maker may be relevant, it is not necessarily determinative.

As such, while noting the Agency's original decision to release all information in the documents except for the names of the Agency officers', I am satisfied there is a broader public interest that would be promoted by disclosure of the documents in full, including the names of Agency officers. Although, in doing so, I consider the documents are largely administrative in nature and merely reflect the Agency officers undertaking their authorised duties in relation to the complaint and exercise of the Agency's functions.

Accordingly, I consider the public interest in disclosure of the documents in full outweighs the interest in protecting the Agency officers' personal privacy in the particular circumstances of this matter given the nature of the information reflects the Agency officers' undertaking their authorised and usual duties in relation to the complaint and exercise of the Agency's functions.

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

During the review, the Agency undertook further consultation with the relevant third parties whose personal affairs information appears in the documents, to seek their views on disclosure of their personal affairs information in the documents to the Applicant.

The Applicant was advised about the further consultation to be undertaken and consented to a copy of a letter they drafted setting out their reasons for seeking access to the documents in full.

[A specified number of] persons are named in the documents. The Agency determined it was practicable to undertake further consultation with [specified number of] Agency staff, who each objected to the disclosure of their personal affairs information under the FOI Act. The Agency determined it was not practicable to consult with [specified number of] former employees named in the documents.

- (e) Whether release of the information could lead the persons to whom it relates suffering stress and anxiety

I acknowledge the Agency officers may not wish to have their names in the documents disclosed. However, I am not satisfied on the basis of the responses provided by the Agency officers to the further consultation undertaken by the Agency that disclosure of their personal affairs information in the documents under the FOI Act would lead to the officers suffering stress and anxiety. In reaching this conclusion, I have also taken into consideration the administrative nature of the information in and the age of the documents.

- (f) Whether disclosure of information would, or would be reasonably likely to endanger the life or physical safety of any person<sup>12</sup>

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

20. Having weighed up the above factors, on balance, I am not satisfied the personal affairs information in the documents is exempt under section 33(1) on grounds I am not satisfied its disclosure would be unreasonable in the circumstances.

### **Conclusion**

21. I am not satisfied the personal affairs information in the documents is exempt under section 33(1) and have determined to release copies of the documents in full.

### **Review rights**

22. 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>13</sup>
23. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.<sup>14</sup>
24. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.<sup>15</sup>
25. 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.
26. 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>16</sup>

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

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

<sup>14</sup> Section 52(5).

<sup>15</sup> Section 52(9).

<sup>16</sup> Sections 50(3F) and (3FA).

***Third party review rights***

27. As I have determined to release the personal affairs information of third parties in the documents, if practicable, I am required to notify those persons of their right to seek review by VCAT of my decision within 60 days from the date they are given notice of my decision.<sup>17</sup>
28. In this case, I am satisfied it is practicable to notify the relevant third parties of their review rights and confirm they will be notified of my decision on the date of decision via the Agency.

***When this decision takes effect***

29. Accordingly, my decision does not take effect until the third parties' 60 day review period expires, or if an application for review is made to VCAT, until the matter is concluded.

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<sup>17</sup> Sections 49P(5), 50(3) and 52(3).