

## Notice of Decision and Reasons for Decision

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Applicant:	'CQ3'
Agency:	City of Greater Geelong
Decision date:	11 February 2021
Exemptions considered:	Sections 30(1), 35(1)(b)
Citation:	'CQ3' and <i>City of Greater Geelong (Freedom of Information)</i> [2021] VICmr 39 (11 February 2021)

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FREEDOM OF INFORMATION – internal emails – contrary to public interest to release – information provided in confidence – disclosure would impair agency's ability 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 decision in that I have decided to refuse access to the documents in full. However, in addition to section 35(1)(b), I have determined certain information in the documents is exempt from release under section 30(1).

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

11 February 2021

## **Reasons for Decision**

### **Background to review**

1. The Applicant made a request to the Agency seeking access to the following documents:  
  
... any documents (emails, paper documents) containing my name sent from [date to date]. The names mentioned may include [names provided].
2. In its decision, the Agency identified certain documents falling within the terms of the Applicant's request and refused to grant access to all document in full. The Agency relied on the exemptions in sections 35(1)(b) and 33(1) to refuse access to the documents.

### **Review**

3. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
4. I have examined copies of the documents subject to review.
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 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 subsequent communications with this office; and
  - (c) the Agency's submission.
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 also note Parliament's intention the FOI Act must 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.

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

9. 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
  - (a) 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 to the Agency?*

10. When determining whether information was communicated in confidence, it is necessary to consider the position from the perspective of the communicator.<sup>1</sup> Further, confidentiality can be express or implied from the circumstances of the matter.<sup>2</sup>
11. Generally, section 35(1)(b) only applies to information communicated to an agency from an outside source, rather than from an officer within an agency. However, in certain circumstances, section 35(1)(b) may apply to confidential information communicated to an agency by an agency officer. For example, in the context of an internal complaint and investigations, or confidential communications between different parts of an agency.<sup>3</sup>
12. I am satisfied information in the documents was communicated to the Agency by third parties in relation to a personnel matter. Accordingly, I am satisfied the nature of this information falls within the scope of information communicated in confidence by a person to the Agency under section 35(1)(b).
13. In such circumstances, I accept third parties provided the information to the Agency with the expectation it would be used for the purpose of addressing the personnel matter and would be treated confidentially. I consider it is reasonably likely the Agency officers would not expect information they provided, or their identity, to be disclosed under the FOI Act, which provides for unconditional and unrestricted use of a document once disclosed.
14. However, certain information in the documents contains material in the nature of consultation and deliberation concerning the Agency's course of action relating to the particular matter. As this information was not provided by a third party, I do not consider such information meets the first limb of section 35(1)(b). However, I consider the application of section 30(1) to this information below.

*Would disclosure be contrary to the public interest?*

15. The exemption under section 35(1)(b) requires I consider whether an agency would be impaired from obtaining similar information in the future if the information is disclosed under the FOI Act. This involves considering whether others in the position of the communicator would be reasonably likely to be inhibited or deterred from providing similar information to an agency in the future should the information be disclosed.
16. Section 35(1)(b) will not be made out if the evidence goes no further than a person would be less candid than what they otherwise might be in providing information to the Agency in the future.<sup>4</sup>
17. I am satisfied disclosure of the information under the FOI Act would impair the ability of the Agency to obtain similar information in the future, for the following reasons:
  - (a) Information in the documents is sensitive in nature. I am unable to provide further information about the nature of the information as to do so would reveal the exempt information in the documents.
  - (b) The information in the documents was obtained in circumstances where there is an expectation of confidentiality.

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<sup>1</sup> XYZ v Victoria Police [2010] VCAT 255 at [265].

<sup>2</sup> Ibid.

<sup>3</sup> See *Sportsbet v Department of Justice* [2010] VCAT 8 at [71]-[78]; *XYZ v Victoria Police* [2010] VCAT 255 at [287]-[288]; *Birnbauer v Inner and Eastern Health Care Network* (1999) 16 VAR 9 at [17].

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

- (c) I acknowledge the Applicant has a strong personal interest in obtaining access to the documents subject to review. I have read the Applicant's review application and submission. However, I do not consider their interest in the documents outweighs the public interest in the Agency being able to deliberate on sensitive matters in the future.
- (d) I accept the Agency relies on information provided voluntarily by third parties in order to deal with personnel matters. Generally, such information is sensitive and confidential. I accept if individuals, who voluntarily provided such information to the Agency were aware their identity or the information provided would be disclosed in response to an FOI request, they would be reasonably unlikely to be willing to communicate similar information to the Agency in the future. This would be a significant and detrimental outcome that would impede the ability of the Agency to deal with sensitive personnel matters.

18. Therefore, I am satisfied disclosure of certain information in the documents 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. This information is exempt under section 35(1)(b).

### ***Section 30(1)***

19. While the Agency did not apply section 30(1), 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 applicable law in force at the time of my decision.

20. Therefore, I have considered the application of section 30(1) to the documents under review.

21. 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;
- (b) 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
- (c) disclosure of the matter would be contrary to the public interest.

22. The exemption does not apply to purely factual material in a document.<sup>5</sup>

### ***Were the documents prepared by an officer of the Agency?***

23. The terms 'officer of an Agency' is defined in section 5(1). It includes a member of an agency, a member of an agency's staff, and any person employed by or on behalf of an agency, whether or not that person is one to whom the provisions of the *Public Administration Act 2004* (Vic) apply.

24. Having reviewed the documents, I am satisfied they were prepared by an 'officer' for the purposes of section 30(1). Accordingly, I am satisfied the first requirement of section 30(1) is met.

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<sup>5</sup> Section 30(3).

*Do the documents contain information in the nature of opinion, advice, recommendation, consultation or deliberation?*

25. I am satisfied the documents contain matter in the nature of deliberation and consultation prepared by an Agency officer. Accordingly, I am satisfied the second requirement of section 30(1) is met.

*Would it be contrary to the public interest for this information to be released?*

26. Determining whether disclosure of this information would be contrary to the public interest requires a 'process of the weighing against each other conflicting merits and demerits'.<sup>6</sup>
27. I must consider all relevant facts and circumstances remaining mindful the object of the FOI Act is to facilitate and promote the disclosure of information. In doing so, I have taken the following factors into consideration:<sup>7</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 documents and the broader context giving rise to the creation of the documents;
  - (c) the stage of a decision or status of policy development or a process being undertaken at the time the communications were made;
  - (d) whether disclosure of the documents would be likely to inhibit communications between Agency officers, essential for the Agency to make an informed and well considered decision or participate fully and properly in a process in accordance with the Agency's functions and other statutory obligations;
  - (e) whether disclosure of the documents would give merely a part explanation, rather than a complete explanation for the making of a particular decision or the outcome of a process, which the Agency would not otherwise be able to explain upon disclosure of the documents;
  - (f) the impact of disclosing documents in draft form, including disclosure not clearly or accurately representing a final position or decision reached by the Agency at the conclusion of a decision or process; and
  - (g) the public interest in the community being better informed about the way in which the Agency carries out its functions, including its deliberative, consultative and decision making processes and whether the underlying issues require greater public scrutiny.
28. The internal communications in this matter were recorded when Agency officers were being informed about a particular matter and constitute deliberation on potential steps and actions to be taken by the Agency.
29. I accept there is a public interest in ensuring agency officers involved in addressing a particular matter are able to discuss, deliberate and record relevant issues and information in a thorough and considered manner. This includes being able to make a written record of information gathered relating to a sensitive matter without concern the inner workings of an agency's internal processes will be released under the FOI Act. I consider, disclosure of the documents would be reasonably likely to inhibit communications between Agency officers essential for it to thoroughly address and resolve sensitive personnel matters.

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<sup>6</sup> *Sinclair v Maryborough Mining Warden* [1975] HCA 17; (1975) 132 CLR 473 at [485], applied in *Department of Premier and Cabinet v Halls* [1999] VSCA 117 at [30].

<sup>7</sup> *Halls v Victorian Casino and Gambling Authority* (1998) 12 VAR 483.

30. On balance, I am satisfied the third requirement of section 30(1) is met and accordingly, I am satisfied certain information in the documents is exempt under section 30(1).
31. The Agency also relied on section 33(1) to exempt information in the documents. As I have determined this information is exempt under sections 30(1) and 35(1)(b) in full, it is not necessary for me to consider the application of section 33(1) to the same information.

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

32. 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.
33. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'<sup>8</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>9</sup>
34. I have considered the effect of deleting exempt information from the documents. I am satisfied it is not practicable to do so as the edited documents would be meaningless.

#### **Conclusion**

35. On the information before me, I am satisfied the documents are exempt under sections 30(1) and 35(1)(b).
36. As I am satisfied it is not practicable to provide the Applicant with an edited copy of the documents with exempt information deleted in accordance with section 25, I have determined to refuse access to the documents in full.
37. The Schedule of Documents in **Annexure 1** sets out my decision in relation to each document.

#### **Review rights**

38. If the Applicant 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>10</sup>
39. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.<sup>11</sup>
40. 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.
41. The Agency is required to notify the Information Commissioner in writing as soon as practicable if an application is made to VCAT for a review of my decision.<sup>12</sup>

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<sup>8</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>9</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>10</sup> The Applicant in section 50(1)(b) and the Agency in section 50(3D).

<sup>11</sup> Section 52(5).

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

## Annexure 1 – Schedule of Documents

Document No.	Document Description	Number of Pages	Agency Decision	OVIC Decision	OVIC Comments
1.	Email	1	Refused in full Sections 35(1)(b), 33(1)	Refuse in full Sections 30(1)	<p><b>Section 35(1)(b):</b> I am not satisfied the information in the document contains information communicated to the Agency on a confidential basis. However, I have considered the application of section 30(1) to this information.</p> <p><b>Section 30(1):</b> I am satisfied the information in the document contains matter in the nature of consultation and deliberation and I have determined it is exempt under section 30(1) for the reasons outlined in the Notice of Decision above.</p> <p><b>Section 25:</b> I am satisfied it is not practicable to provide the Applicant with 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.</p>
2.	Email chain	2	Refused in full Sections 35(1)(b), 33(1)	Refuse in full Section 30(1)	<p><b>Section 35(1)(b):</b> See comments for Document 1.</p> <p><b>Section 30(1):</b> The email chain includes the email from Document 1 and a response to the email. See comments for Document 1.</p>
3.	Email	1	Refused in full Sections 35(1)(b), 33(1)	Refuse in full Section 35(1)(b)	<p><b>Section 35(1)(b):</b> I am satisfied the email is exempt under section 35(1)(b) for the reasons outlined in the Notice of Decision above.</p> <p>As I have determined the document is exempt in full under section 35(1)(b), it is not necessary for me to</p>

## Annexure 1 – Schedule of Documents

Document No.	Document Description	Number of Pages	Agency Decision	OVIC Decision	OVIC Comments
					consider the application of section 33(1) to the document.
4.	Email chain	3	<b>Refused in full</b>  Sections 35(1)(b), 33(1)	<b>Refuse in full</b>  Sections 35(1)(b), 30(1)	<p><b>Section 35(1)(b):</b> The email chain includes the email from Document 3 and responding emails. I am satisfied the document includes information that is exempt under section 35(1)(b) for the reasons outlined in the Notice of Decision above.</p> <p><b>Section 30(1):</b> See comments for Document 1.</p> <p>As I have determined the document is exempt in full under sections 35(1)(b) and 30(1), it is not necessary for me to consider the application of section 33(1) to the document.</p> <p><b>Section 25:</b> See comments for Document 1.</p>
5.	Email	3	<b>Refused in full</b>  Sections 35(1)(b), 33(1)	<b>Refuse in full</b>  Section 35(1)(b), 30(1)	<p><b>Section 35(1)(b):</b> The email chain includes emails from Document 4, as well as responding emails. I am satisfied the document includes information that is exempt under section 35(1)(b) for the reasons outlined in the Notice of Decision above.</p> <p><b>Section 30(1):</b> See comments for Document 1.</p> <p>As I have determined the document is exempt in full under sections 35(1)(b) and 30(1), it is not necessary for me to consider the application of section 33(1) to the document.</p> <p><b>Section 25:</b> See comments for Document 1.</p>



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Document No.	Document Description	Number of Pages	Agency Decision	OVIC Decision	OVIC Comments
6.	Email	7	Refused in full Sections 35(1)(b), 33(1)	Refuse in full Sections 35(1)(b), 30(1)	<p><b>Section 35(1)(b):</b> I am satisfied the document includes information that is exempt under section 35(1)(b) for the reasons outlined in the Notice of Decision above.</p> <p><b>Section 30(1):</b> See comments for Document 1.</p> <p><b>Section 25:</b> See comments for Document 1.</p>
7.	Email	1	Refused in full Sections 35(1)(b), 33(1)	Refuse in full Section 30(1)	<p><b>Section 35(1)(b):</b> I am not satisfied the document contains information communicated to the Agency on a confidential basis for the purposes of section 35(1)(b). However, for the reasons outlined in the Notice of Decision above, I have considered the application of section 30(1) to this information.</p> <p><b>Section 30(1):</b> I am satisfied the information in the document contains matter in the nature of consultation and deliberation and I am satisfied it is exempt under section 30(1) for the reasons outlined in the Notice of Decision above.</p> <p>As I have determined the document is exempt in full under section 30(1), it is not necessary for me to consider the application of section 33(1) to the document.</p> <p><b>Section 25:</b> See comments for Document 1.</p>
8.	Email chain	2	Refused in full	Release in part	<p><b>Section 35(1)(b):</b> I am satisfied the document includes information that is exempt under section</p>

## Annexure 1 – Schedule of Documents

Document No.	Document Description	Number of Pages	Agency Decision	OVIC Decision	OVIC Comments
			Sections 35(1)(b), 33(1)	Sections 35(1)(b), 30(1), 25	<p>35(1)(b) for the reasons outlined above in the Notice of Decision.</p> <p><b>Section 30(1):</b> See comments for Document 1.</p> <p><b>Section 25:</b> I am satisfied it is practicable to provide the Applicant with an edited copy of the document with exempt information deleted in accordance with section 25, as to do so would not render the document meaningless. Accordingly, the document is exempt in part.</p>
9.	Email	2	<p><b>Refused in full</b></p> <p>Sections 35(1)(b), 33(1)</p>	<p><b>Refuse in full</b></p> <p>Section 35(1)(b)</p>	<p><b>Section 35(1)(b):</b> I am satisfied the document contains information that was communicated to the Agency on a confidential basis for the purposes of section 35(1)(b) and this information is exempt under section 35(1)(b) for the reasons outlined in the Notice of Decision above.</p> <p>As I have determined the document is exempt in full under section 35(1)(b), it is not necessary for me to consider the application of section 33(1) to the document.</p> <p><b>Section 25:</b> See comments for Document 1.</p>
10.	Email	1	<p><b>Refused in full</b></p> <p>Sections 35(1)(b), 33(1)</p>	<p><b>Refuse in full</b></p> <p>Sections 35(1)(b), 30(1)</p>	<p><b>Section 35(1)(b):</b> I am satisfied the document includes information that is exempt under section 35(1)(b) for the reasons outlined in the Notice of Decision above.</p> <p><b>Section 30(1):</b> I am also satisfied the documents</p>

## Annexure 1 – Schedule of Documents

Document No.	Document Description	Number of Pages	Agency Decision	OVIC Decision	OVIC Comments
					includes information that is exempt under section 30(1) for the reasons outlined above in the Notice of Decision.  <b>Section 25:</b> See comments for Document 1.
11.	Email	2	<b>Refused in full</b>  Sections 35(1)(b), 33(1)	<b>Refuse in full</b>  Section 30	<b>Section 35(1)(b):</b> I am not satisfied information in the document was communicated to the Agency on a confidential basis for the purposes of section 35(1)(b). However, I have considered the application of section 30(1) to this information.  <b>Section 30(1):</b> I am satisfied the document includes information that is exempt under section 30(1) for the reasons outlined in the Notice of Decision above.  <b>Section 25:</b> See comments for Document 1.