

## Notice of Decision and Reasons for Decision

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Applicant:	'DS3'
Agency:	Victorian Legal Services Board
Decision date:	1 October 2021
Exemptions considered:	Sections 33(1) and 38 of the <i>Freedom of Information Act 1982</i> (Vic) in conjunction with schedule 4, part 1, sections 2(2) and 2(4) of the <i>Legal Profession Uniform Law Application Act 2014</i> (Vic) which save sections 6.4.5 and 7.2.15 of the <i>Legal Profession Act 2004</i> (Vic) and section 362 of the <i>Legal Practice Act 1996</i> (Vic)
Citation:	'DS3' and Victorian Legal Services Board (Freedom of Information) [2021] VICmr 292 (1 October 2021)

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FREEDOM OF INFORMATION – regulator documents – complaint – legal profession– law practice – emails – internal documents – information provided in confidence – secrecy provision – *Legal Profession Act 2004* (Vic) – *Legal Practice Act 1996* (Vic) – *Legal Profession Uniform Law Application Act 2014* (Vic) – Uniform Law

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 certain information in the documents is exempt under sections 33(1) and 38 of the FOI Act in conjunction with schedule 4, part 1, sections 2(2) and 2(4) of the *Legal Profession Uniform Law Application Act 2014* (Vic) which save sections 6.4.5 and 7.2.15 of the *Legal Profession Act 2004* (Vic) and section 362 of the *Legal Practice Act 1996* (Vic).

As I am satisfied it is practicable to provide the Applicant with an edited copy of the documents with exempt information deleted in accordance with section 25, access to the documents is granted in part.

My reasons for decision follow.

**Joanne Kummrow**  
Public Access Deputy Commissioner  
1 October 2021

## Reasons for Decision

### Background to review

1. The Applicant made a request to the Victorian Legal Services Board (the **Agency**) seeking access to certain documents:
  - (a) all documents referring to [Applicant], or mentioning [Applicant] by name, as were the possession of the [Agency] (in) the period from [date];
  - (b) all documents referring to [Applicant], or mentioning [Applicant] by name, as dated or were created in the [date] that have at any time been in the possession of the [Agency] and refer to any [description of] matters;
  - (c) all documents contained in and or related to the [Complaint File] as were in the possession of the [Agency] in the [date];
  - (d) all documents contained in and or relate to the [Complaint File] as are dated or were created in the [date] that have at anytime been in the possession of the [Agency];
  - (e) a copy of the [Complaint File], including internal working documents which are subject to privilege; and
  - (f) all documents relating to or recording either the [Agency] or [other Agency] decision to close the [Complaint File] (but then) subsequently changed its view, due to the passage of time between [other Agency] letter of [dated] and [other Agency's] previous correspondence with [Applicant].
2. The Agency is an independent statutory authority responsible for the regulation of the legal profession in Victoria. The Agency was established under the *Legal Profession Act 2004 (Vic)* (the **Legal Profession Act**). However, its functions and powers now come under the *Legal Profession Uniform Law Application Act 2014 (Vic)* (the **Uniform Law**).<sup>1</sup>
3. The Agency identified 137 pages falling within the terms of the Applicant's request. The Agency granted access to 132 pages in full and five pages in part relying on sections 33(1) and 38 of the FOI Act in conjunction with sections 6.4.5 and 7.2.15 of the Legal Profession Act and section 362 of the *Legal Practice Act 1996 (Vic)* (the **Legal Practice Act**). The Agency's decision letter sets out the reasons for its decision.

### Review application

4. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
5. I have examined copies of the five pages of 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. 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.

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<sup>1</sup> See [third party Agency]

9. I 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.

## **Review of exemptions**

### ***Section 38 – Secrecy provision***

10. A document will be exempt under section 38 if the following three requirements are met:
- (a) there is an enactment in force;
  - (b) that applies specifically to the kind of information in the document; and
  - (c) the enactment must prohibit persons, referred to in the enactment, from disclosing that specific kind of information (either absolutely or subject to exceptions or qualifications).
11. For section 38 to apply, an enactment must be formulated with such precision that it specifies the actual information sought to be withheld.
12. In the Agency's decision, it relies on section 38 in conjunction with:
- (a) sections 6.4.5 and 7.2.15 of the Legal Profession Act with respect to documents in existence prior to 1 July 2015; and
  - (b) section 362 of the Legal Practice Act with respect to documents created or generated prior to 12 December 2005.
13. Section 6.4.5 of the Legal Profession Act provides in part:

#### **Confidentiality**

- (1) This section applies to a person who is or has been—
  - (a) a member of the Board; or
  - (b) the Commissioner; or
  - (c) an employee in the office of the Commissioner; or
  - (d) a consultant engaged by the Commissioner; or
  - (e) a mediator; or
  - (f) a person to whom the Board or the Commissioner has delegated functions under this Act.
- (2) A person to whom this section applies must not, directly or indirectly, make a record of, disclose or communicate to any person any information relating to the affairs of any person or law practice acquired in the performance of functions under this Act, unless—
  - (a) it is necessary to do so for the purpose of, or in connection with, the performance of a function under this Act; or
  - (b) the person to whom the information relates gives written consent to the making of the record, disclosure or communication.

Penalty: 120 penalty units.

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14. Section 7.2.15 of the Legal Profession Act provides in part:

**Confidentiality of personal information**

- (1) A relevant person must not disclose to any other person, whether directly or indirectly, any personal information obtained by reason of being a relevant person, except to the extent necessary—
- (a) to perform functions or duties under this Act, the regulations or the legal profession rules, or under any other Act or subordinate instrument; or
  - (b) to disclose information that the relevant person is expressly authorised, permitted or required to disclose under—
    - (i) this Act, including Division 6 of Part 4.4; or
    - (ii) the regulations or legal profession rules; or
    - (iii) any other Act or subordinate instrument.

Penalty: 60 penalty units.

- (2) Sub-section (1) does not apply to the disclosure of information—
- (a) with the prior consent in writing of the person to whom the information relates; or
  - (b) to a court or tribunal in the course of legal proceedings; or
  - (c) pursuant to an order of a court or tribunal under another Act or law; or
  - (d) to the extent reasonably required to enable the enforcement or investigation of the criminal law or a disciplinary matter.

- (3) Sub-section (1) extends to the disclosure of information that was disclosed under a corresponding law to a local regulatory authority or a relevant person.

- (4) In this section—

**"local regulatory authority"** means—

- (a) an authority having functions under this Act; or
- (b) a person or body prescribed, or of a class prescribed, by the regulations;

**"personal information"** means information or an opinion (including information or an opinion forming part of a database) that is recorded in any form and whether true or not, about a natural person whose identity is apparent, or can be reasonably ascertained, from the information or opinion, but does not include information or an opinion of a kind specified in the regulations;

**"relevant person"** means—

- (a) a local regulatory authority; or
- (b) a member or former member of a regulatory authority; or
- (c) a person currently or previously employed by or acting at the direction of a local regulatory authority.

*Section 362 of the Legal Practice Act*

15. Section 362 of the Legal Practice Act applies to documents created or generated before 12 December 2005 and includes documents captured by part of the Applicant's FOI request relating to the Complaint File.

16. Section 362 of the Legal Practice Act provides in part:

**362 Secrecy**

- (1) A person who is, or has been, a member or an acting member of the Board or an employee of or consultant to the Board must not, directly or indirectly, make a record of, disclose or communicate to any person any information relating to the affairs of any person or firm acquired in the performance of functions or duties or exercise of powers under this Act, unless –
- (a) it is necessary to do so for the purpose of, or in connection with, the performance of a function or duty or exercise of a power under this Act; or
  - (b) the person to whom the information relates gives written consent to the making of the record, disclosure or communication.
- Penalty: 100 penalty units.

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Is there an enactment in force?

17. The Legal Profession Act and Legal Practice Act are now repealed Acts under the Uniform Law.
18. While the Legal Profession Act and Legal Practice Act are now repealed, schedule 4, part 1, sections 2(2) and 2(4) of the Uniform Law<sup>2</sup> are saving provisions in respect to secrecy provisions under the Legal Profession Act and Legal Practice Act.
19. The documents subject to review were created between [year] and [year] when the Legal Profession Act was in force, but are also covered in part by the Legal Practice Act.
20. I am satisfied the above provisions of the Legal Profession Act and the Legal Practice Act apply to the Agency and its officers in this instance because of schedule 4, part 1, sections 2(2) and 2(4) of the Uniform Law
21. Accordingly, I am satisfied there is an enactment in force and the first requirement of section 38 is met.

Do the Legal Profession Act and Legal Practice Act apply specifically to information in the documents?

22. It is clear from the terms of the Applicant's request and the Agency's confidential submissions provided to OVIC that the Applicant seeks access to documents in the Agency's complaint or investigation files that relate to the affairs of any person or law practice acquired in the performance of functions under the Legal Profession Act.
23. Investigations conducted by the Agency into complaints made against legal practitioners and law practices is one of its core statutory function under the Legal Profession Act, Legal Practice Act and Uniform law. I accept information in the requested documents concerns legal practitioners and law practices.
24. Therefore, I am satisfied sections 6.4.5(2) and 7.2.15(1) of the Legal Profession Act and section 362(1) of the Legal Practice Act specify the kind of information in the requested documents, specifically, 'any information relating to the affairs of any person or law practice' and 'any personal information', as prescribed in sections 6.4.5(2) and 7.2.15(1) of the Legal Profession Act, and in the case of section 362(1) of the Legal Practice Act, 'any information relating to the affairs of any person or firm acquired in performance of functions or duties or exercise of power under the [Legal Practice Act]'.
25. Accordingly, I am satisfied the second requirement of section 38 is met.

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<sup>2</sup> *Legal Professional Uniform Law Application Act 2014* (Vic) schedule 4, part 1, sections 2(2) and 2(4).

Do any exceptions to the prohibition on disclosure of the documents apply?

26. Sections 6.4.5(2)(a) and 7.2.15(2)(a) of the Legal Profession Act and section 362(1)(b) of the Legal Practice Act contain exceptions to the prohibition on disclosure where the relevant person provides their consent to disclosure of the information.
27. The interaction between consent and section 38 of the FOI Act is considered in *Gullquist v Victorian Legal Services Commissioner (Gullquist decision)*<sup>3</sup> in which the Victorian Civil and Administrative Tribunal (VCAT) states:
- Where that consent is not given, s 38 exempts the document from disclosure under the FOI Act because s 6.4.5 prohibits disclosing of that kind.
- Where that consent is given, s 6.4.5 no longer prohibits persons referred to in the LPA from disclosing the information. Therefore, s 38 no longer exempts the document from disclosure under the FOI Act.<sup>4</sup>
28. I accept the Applicant consents to disclosure of the information in the Agency's regulatory files relating to themselves through the making of their FOI request to the Agency. I also accept the Agency's submission that documents, which contain information purely about the Applicant, were released to them outside the FOI Act.
29. The consent of the other legal practitioners and law practices has not been established, and while the Agency's submission is silent on the issue, I accept if those persons had consented to disclosure, the Agency would have advised OVIC accordingly. As is the case in the *Gullquist* decision, I consider these third parties did not provide their consent to disclosure.<sup>5</sup>
30. Therefore, I am not satisfied the exceptions under the Legal Profession Act and Legal Practice Act apply in this case.
31. Based on my findings above, I am satisfied the information in the documents subject to review is exempt under section 38 in conjunction with sections 6.4.5(2) and 7.2.15(1) of the Legal Profession Act and section 362(1) of the Legal Practice Act.

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

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 (a third party);<sup>6</sup> and
  - (b) such disclosure would be 'unreasonable'.

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

33. Information relating to an individual'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>7</sup>

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<sup>3</sup> [2017] VCAT 764.

<sup>4</sup> Ibid at [69].

<sup>5</sup> Ibid at [81].

<sup>6</sup> Sections 33(1), (2).

<sup>7</sup> Ibid s 33(9).

34. A document will disclose a third party's personal affairs information if it is capable, either directly or indirectly, of identifying that person. As the nature of disclosure under the FOI Act is unrestricted and unconditional, this is to be interpreted by reference to the capacity of any member of the public to identify a third party.<sup>8</sup>
35. I am satisfied the documents subject to my review contain information that identifies third parties, including their names, initials, position titles, telephone numbers and email addresses.
36. Accordingly, I am satisfied disclosure of the documents under the FOI Act would involve disclosure of personal affairs information of third parties.

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

37. The concept of 'unreasonable disclosure' involves balancing the public interest in the disclosure of the official information with interest in protecting the privacy of an individual other than the applicant in the circumstances.
38. In *Victoria v Marke*,<sup>9</sup> the Victorian Court of Appeal held there is 'no absolute bar to providing access to documents which relate to the personal affairs of others'. Further, 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'.
39. 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 circumstance in which the information was obtained

Information provided during an investigation is ordinarily communicated to the Agency on a voluntary basis and with the expectation it will remain confidential unless required for a subsequent legal proceeding.

Having reviewed the documents and noting the circumstances in which they were obtained by the Agency, I am of the view the third parties who provided the information to the Agency, would not reasonably expect their personal affairs information would be disclosed to the Applicant under the FOI Act.

I accept the Agency's submission that certain Agency officers and other third parties were not involved in the investigation matter and were merely administrative officers who had incidental involvement in the matter. Where an individual has a peripheral role in a matter, I am of the view disclosure of their names, initials, telephone numbers or email addresses, where the Applicant does not already know this information, is more likely to be unreasonable.

(b) Whether the third party to whom the information relates object, or would be likely to object, to the release of their personal affairs information

The Agency did not consult with the third parties to obtain their view on disclosure of their personal affairs information.

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<sup>8</sup> *O'Sullivan v Department of Health and Community Services (No 2)* [1995] 9 VAR 1 at [14]; *Beauchamp v Department of Education* [2006] VCAT 1653 at [42].

<sup>9</sup> [2008] VCSA 218 at [68].

Given the nature and circumstance of the information obtained was likely incidental in the Agency officers involvement in the matter, I consider the relevant third parties would be likely to object to disclosure of their personal affairs information under the FOI Act, if consulted.

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

There is no information before me to suggest the public interest would be promoted by disclosure of the third parties' personal affairs information. Rather, I consider disclosure of this information would serve the Applicant's private interests only.

I am of the view the greater public interest lies in the Agency preserving the confidentiality of information provided to it by third parties and administrative staff, or other sources of information, during the course of a regulatory investigation. This ensures the Agency's ability to obtain the cooperation of the public and similar information in order to effectively and efficiently carry out its investigative functions. Therefore, I consider there is a greater public interest in the personal affairs information of third parties not being disclosed to the Applicant.

(d) Whether disclosure of the information would, or would be reasonably likely to endanger the life or safety of any person

In determining 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>10</sup> However, I do not consider this is a relevant factor in this matter.

40. Having weighed up the above factors, I am satisfied disclosure of the personal affairs information in the documents would be unreasonable in the circumstances. Accordingly, I am satisfied this information is exempt under section 33(1).

**Section 25 – Deletion of exempt or irrelevant information**

41. Section 25 requires an agency to grant access to an edited copy of a document where it is practicable to delete exempt or irrelevant information and the applicant agrees to receiving such a copy.
42. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'<sup>11</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>12</sup>
43. Given my decision is the same as the Agency's decision, and the Applicant was provided with an edited copy of the documents with exempt information deleted in accordance with section 25, I am satisfied it remains practicable to provide access to the documents in part.

**Conclusion**

44. On the information before me, I am satisfied certain information in the documents is exempt under sections 33(1) and 38 of the FOI Act in conjunction with sections 6.4.5(2) and 7.2.15(1) of

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<sup>10</sup> Section 33(2A).

<sup>11</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>12</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].



the Legal Profession Act and section 362(1) of the Legal Practice Act (as saved by schedule 4, part 1, sections 2(2) and 2(4) of the Uniform Law).

45. As I am satisfied that it is practicable to provide the Applicant with an edited copy of the documents with exempt information deleted in accordance with section 25, access to the documents is granted in part.

### **Review rights**

46. 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>
47. 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>
48. 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>
49. 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
50. 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>
51. If a review application is made to VCAT, my decision will be subject to any VCAT determination.

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<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).