

## Notice of Decision and Reasons for Decision

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Applicant:	'DZ1'
Agency:	Department of Justice and Community Safety
Decision date:	3 May 2022
Provision considered:	Section 33(6)
Citation:	'DZ1' and <i>Department of Justice and Community Safety</i> (Freedom of Information) [2022] VICmr 19 (3 May 2022)

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FREEDOM OF INFORMATION – decision by agency to neither confirm nor deny the existence of a requested document – personal affairs information – no documents exist

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 am satisfied no document exists that contains the information sought by the Applicant in their FOI request.

As such, I consider the correct and preferable decision in relation to the Applicant's FOI request is that no document exists that contains the information sought by the Applicant in their request.

My reasons for decision follow.

**Joanne Kummrow**  
Public Access Deputy Commissioner

3 May 2022

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## Reasons for Decision

### Background to review

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

We request pursuant to the *Freedom of Information Act* a copy of any document (including but not limited to screenshots of any databases maintained by the RTBA [Residential Tenancy Bond Authority]):

- (a) evidencing the payment or return of a Residential Tenancies Bond in relation to the property [an address in Victoria] during the period [date] until [date]; and
- (b) evidencing the existence of a Residential Tenancies Bond in relation to the property [an address in Victoria] during the period [date] until [date] (for example a request for information or payment in relation to a Residential Tenancies Bond).

We agree to the redaction of all personal information in relation to this request including the name, phone number, email, date of birth and address of any person referred to in the document so long as the document produced clearly shows that it relates to the property [named location] and the date the document and any other dates within that document.

2. In its decision, the Agency determined in accordance with section 33(6) to neither confirm nor deny the existence of any documents falling within the scope of the Applicant's request on grounds to do so would reveal information exempt from release under section 33(1). The Agency's decision letter sets out the reasons for its decision.

### Review application

3. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
  4. The Agency's reliance on section 33(6) removes the need for the Agency to provide me with a copy of any document that falls within the terms of the Applicant's request, should any exist.
  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 dated 20 January 2022;
    - (b) the Applicant's submission dated 24 January 2022; and
    - (c) the Agency's submissions dated 4 February 2022, 7 and 17 March 2022 and 6 and 12 April 2022.
  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 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.
  9. In conducting a review under section 49F, 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 is the 'correct or preferable decision'. This involves ensuring my decision is
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correctly made under the FOI Act and any other applicable law in force at the time of making my fresh decision.

### ***Applicant's submission***

10. In its submission, the Applicant's legal representative provides the following reasons for making the FOI request:

Our client has owned and operated a [property description] at [second named location] for the last [number of] years.

[Named location] was sold to new owners in [year]. To the best of our client's knowledge there has rarely been anyone living in [named location]. The owner of [named location] has objected to our client's application to amend [their] planning permit for [second named location] on the grounds that:

*The proposal will result in unreasonable off-site amenity impacts in the form of noise disturbance associated with music and patrons, including to the adjacent dwelling on the land at [named location].*

Our client requires the information subject of this application to ascertain the extent to which [named location] has been used as a dwelling since the current owner has owned the building. A line of VCAT cases since 2007 have held that the definition of a dwelling has two elements: *"first it requires the building to consist of various facilities (sink kitchen etc), and second, it requires the actual use of the building as a residence"*.

Our client's request only goes to the use of the dwelling and does not require the disclosure of personal information. Our client has specifically consented to reasonable redactions being made to avoid the disclosure of personal information.

11. In respect to the Agency's decision, the Applicant's legal representative submits:

... (the Agency's) decision ignores the consent to redaction included in the request...

The redaction of personal information completely negates (the Agency's) grounds of refusal that *"disclosure would involve unreasonable disclosure of information relation to the personal affairs of any person"*.

The redaction of personal information would result in no information relation to the personal affairs of any person being released.

### **Review of exemption**

#### ***Section 33(6) – Confirming the existence or non-existence of a document***

12. Section 33(6) provides:

Nothing in this Act shall be taken to require an agency or Minister to give information as to the existence or non-existence of a document of a kind referred to in subsection (1) [section 33(1)] where information as to the existence or non-existence of that document, if included in a document of an agency, would cause the last mentioned document to be an exempt document by virtue of this section.

13. In *Re O'Sullivan and Department of Health and Community Services*<sup>1</sup> (**O'Sullivan decision**), the former Administrative Appeals Tribunal of Victoria observed:

Subsection (6) of [section] 33 raises a particular difficulty. Where a respondent relies upon its terms, the Tribunal does not have the advantage of perusing any disputed documents. Were the presiding Tribunal Member to be seen to be perusing documents "the game would be given away"; the applicant would be

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<sup>1</sup> (No 2) (1995) 9 VAR 1.

aware that the respondent agency did in fact possess documents relating to the personal affairs of a particular named individual and had probably been in contact with that individual.<sup>2</sup>

14. Section 33(6) requires consideration of whether merely confirming the existence of a requested document would disclose information that would otherwise be exempt under section 33(1).

*Would disclosure of the existence or non-existence of a document reveal personal affairs information of a third party, the disclosure of which would be unreasonable under section 33(1)?*

15. 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**); and
- (b) such disclosure would be 'unreasonable'.

16. Information relating to the 'personal affairs' of a person 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>3</sup>

17. The Agency submits the absence of any information about an owner and/or tenant in the requested document constitutes the personal affairs information of a person other than the Applicant.

18. While the Applicant's legal representative advised during the review that access to the personal affairs information of third parties is not sought, for example a person's name, the existence or non-existence of a document confirming whether a bond exists may constitute the personal affairs information of a third party.

19. During the review, the Agency provided OVIC with a copy of a document following a search of the RTBA Register in support of its decision (**supporting document**). The Agency does not consider the supporting document falls within the terms of the Applicant's request, rather, it provided it to demonstrate whether or not a document falling within the terms of the Applicant's request exists.

20. Having reviewed the document, which corresponds to the property address in the Applicant's FOI request, I am satisfied no information is recorded in the document in relation to the payment of a bond at the property.

21. Further, as the document does not contain the personal affairs information of any person for the purposes of section 33(1), I am satisfied the correct and preferable decision in this matter is that no document exists that contains the information sought by the Applicant in their FOI request.

22. For completeness, I confirm that my decision that no document exists does not disclose any personal affairs information of a third party, for example, the owner or a tenant of the property for the purposes of section 33.

## Conclusion

23. My decision on the Applicant's request differs from the Agency's decision in that I am satisfied no document exists that contains the information sought by the Applicant in their FOI request.

24. As such, I consider the correct and preferable decision in relation to the Applicant's FOI request is that no document exists that contains the information sought by the Applicant in their request.

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<sup>2</sup> Ibid at [7].

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

## **Review rights**

25. 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>4</sup>
26. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.<sup>5</sup>
27. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.<sup>6</sup>
28. 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.
29. 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>7</sup>

## ***When this decision takes effect***

30. My decision does not take effect until the Agency's 14 day review period expires.
31. If a review application is made to VCAT, my decision will be subject to any VCAT determination.

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<sup>4</sup> The Applicant in section 50(1)(b) and the Agency in section 50(3D).

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

<sup>6</sup> Section 52(9).

<sup>7</sup> Sections 50(3F) and (3FA).

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