

## Notice of Decision and Reasons for Decision

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Applicant: 'EA8'  
Agency: Victorian Building Authority  
Decision date: 17 February 2022  
Exemption considered: Section 30(1)  
Citation: 'EA8' and Victorian Building Authority (Freedom of Information) [2022]  
VICmr 35 (17 February 2022)

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FREEDOM OF INFORMATION – cladding audit – inspection report – draft risk assessment tool – internal working document – public interest considerations – contrary to the public interest

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 a document 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 the document is exempt from release under section 30(1).

As 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, access to the document is denied in full.

My reasons for decision follow.

**Joanne Kummrow**  
Public Access Deputy Commissioner

17 February 2022

## Reasons for Decision

### Background to review

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

VBA Risk Assessment for the apartment building at [address].
2. The Agency identified one document falling within the terms of the Applicant's request and refused access to the document in full under section 30(1).
3. 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 a copy of the document 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.
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.

### Agency's Advisory Role

10. As part of the Agency's submission, it provided background information on its role in leading the Victorian Statewide Cladding Audit (the **Audit**) on behalf of the Victorian Government.
11. The Agency convenes an advisory reference panel that comprises a number of experts, who provide their views when considering cladding issues involving a particular building.
12. The Agency has published information explaining, at a basic level, how it conducts inspections.<sup>1</sup>

### Section 30(1) – Internal working documents

13. Section 30(1) has three requirements:
  - (a) the document must disclose matter in 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;

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<sup>1</sup> Victoria Building Authority, *Auditing combustible cladding in Victoria*, <<https://www.vba.vic.gov.au/cladding/audit>>.

- (b) such matter must be made in the course of, or for the purpose of, the deliberative processes involved in the function of an agency or Minister or of the government; and
- (c) disclosure of the matter would be contrary to the public interest.

14. The exemption does not apply to purely factual material in a document.<sup>2</sup>

15. The document is a draft Risk Assessment Tool, which is used to establish an initial risk rating of a building with cladding.

*Was the document prepared by an officer of the Agency?*

16. The term '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 engaged 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.

17. Having reviewed the document, I am satisfied it was prepared by an officer of the Agency for the purposes of section 30(1).

*Does the document contain information in the nature of opinion, advice, recommendation, consultation or deliberation?*

18. For the requirements of section 30(1) to be met, a document must contain matter in the nature of opinion, advice or recommendation prepared by an officer of an agency, or consultation or deliberation between officers.

19. It is not necessary for a document to be in the nature of opinion, advice or recommendation. Rather, it is required that release of the document would disclose matter of that nature.<sup>3</sup>

20. Section 30(3) provides purely factual information will not be exempt under section 30(1).

21. In its submission, the Agency states the document contains excerpts of information that is intertwined with opinion and advice.

22. Having reviewed the document, I am satisfied it contains matter in the nature of opinion, advice and deliberation.

*Was the document 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?*

23. The term 'deliberative process' is interpreted widely and includes any of the processes of deliberation or consideration involved in the functions of an agency, Minister or government.<sup>4</sup>

24. In *Re Waterford and Department of Treasury (No.2)*,<sup>5</sup> the former Victorian Administrative Appeals Tribunal held:

... "deliberative processes" [is] wide enough to include any of the processes of deliberation or consideration involved in the functions of an agency... In short, ...its thinking processes — the processes of reflection, for example, upon the wisdom and expediency of a proposal, a particular decision or a course of action.

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<sup>2</sup> Section 30(3).

<sup>3</sup> *Mildenhall v Department of Education* (1998) 14 VAR 87.

<sup>4</sup> *Brog v Department of Premier and Cabinet* (1989) 3 VAR 201 at 208.

<sup>5</sup> [1984] AATA 67; (1984) 5 ALD 588; 1 AAR 1 at [58].

25. With respect to risk assessment tools, the Agency submits:

Risk assessment tools, such as the document requested in this instance, are sensitive working documents that record the advisory reference panel's considerations about the building. The sensitivity of such documents is due to the subject matter relating to considerations of fire safety. Advisory reference panels consist of a number of experts, with different specialities, who put their subjective views about the matter during their consideration of a particular building. The panel's views are recorded in the risk assessment tool, which is an inherently deliberative document. I understand that the methodology for identification, assessment and management of buildings affected by combustible cladding is complex, highly technical and involves multiple expert opinions.

I understand that the reference panel uses the risk assessment tool to inform its risk rating and advice to the municipal building surveyors for consideration, noting that municipal building surveyors exercise statutory functions under the *Building Act 1993* (Vic.).

26. I accept the document was prepared in the course of the advisory reference panel's deliberative processes with respect to the assessment of buildings affected by combustible cladding.

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

27. I must also be satisfied disclosure of this information would not be contrary to the public interest. This requires a 'process of the weighing against each other conflicting merits and demerits'.<sup>6</sup>

28. In doing so, 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, limited only by exemptions that protect essential public interests.

29. In determining whether disclosure would be contrary to the public interest, 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

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

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

- (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.
30. I have considered the following factors in determining whether disclosure of the document would be contrary to the public interest:
- (a) The document concerns a sensitive matter, being an inspection of cladding on a particular residential property;
  - (b) Disclosure of the document under FOI is on an unrestricted and unconditional basis. Therefore, broader disclosure of the document, which contains specific details relevant to risks associated with combustible cladding, may allow a person to identify or target buildings with cladding, which may pose a public safety concern.
  - (c) The Agency has responsibility for any enforcement actions required and may have different information available to it than what is available to members of the public;
  - (d) Disclosure could have an adverse effect on the integrity of the decision-making process; and
  - (e) The information contained in the documents was provided voluntarily and in confidence to the Agency in its capacity as a regulatory body. Disclosure therefore could prejudice the ability of the Agency to obtain such information in the future.
31. I have carefully considered the factor outlined in paragraph 29(g), that of the public interest in the community being better informed about the way in which an agency carries out its functions, including whether the Agency's decision making could benefit from greater public scrutiny. However, in this matter, for the reasons set out above and based on the information before me, I consider disclosure of the Risk Assessment Tool is not in the public interest. As such, I am satisfied the document is exempt under section 30(1).

### ***Section 25 – 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 whether it is practicable to provide an edited copy of the document with exempt information deleted in accordance with section 25. In my view, I am not satisfied it is practicable to delete exempt information from the document, as I consider such editing would render the document meaningless.

### **Conclusion**

35. On the information before me, I am satisfied the document is exempt from release under section 30(1).

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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].

36. In my view, it is not practicable for the Agency to delete exempt information in the document, because the edited document would not retain meaning. Accordingly, I have determined to refuse access to the document in full.

### **Review rights**

37. 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>10</sup>
38. 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>
39. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.<sup>12</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 either party applies to VCAT for a review of my decision.<sup>13</sup>

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<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> Section 52(9).

<sup>13</sup> Sections 50(3F) and (3FA).