

Notice of Decision and Reasons for Decision

Applicant:	'EC2'
Agency:	Victorian Building Authority
Decision date:	28 June 2022
Exemption considered:	Section 33(1)
Citation:	'EC2' and Victorian Building Authority (Freedom of Information) [2022] VICmr 46 (28 June 2022)

FREEDOM OF INFORMATION – regulatory documents – regulatory action – *Building Act 1993* (Vic) – complaint – building practitioner – letter of caution

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, as I am satisfied the document is exempt from release under section 33(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 refused in full.

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner
28 June 2022

Reasons for Decision

Background to review

1. The Applicant made a complaint to the Agency in relation to the conduct of a building practitioner.
2. Following consideration of the allegations made against the building practitioner, the Agency notified the Applicant of the outcome of its inquiries or investigation.
3. Subsequently, the Applicant made a Freedom of Information request to the Agency seeking access to a copy of the 'official caution issued' to the building practitioner as indicated in the letter of outcome received by the Applicant. The Applicant attached a copy of the outcome letter they received with their FOI request.
4. The Agency identified one document falling within the terms of the Applicant's request and refused access in full under section 33(1). The Agency's decision letter sets out the reasons for its decision.

Review application

5. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
6. I have examined a copy of the document subject to review.
7. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
8. I have considered all communications and submissions received from the parties.
9. 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.
10. 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 exemption

Section 33(1) – Documents affecting personal privacy of third parties

11. 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**);¹ and
 - (b) such disclosure would be 'unreasonable'.

¹ Sections 33(1) and 33(2).

Does the document contain personal affairs information of individuals other than the Applicant?

12. 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 such information may be reasonably determined.²
13. 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.³
14. Information will relate to a third party's personal affairs if it 'concerns or affects that person as an individual'.⁴
15. The scope of personal affairs information has been interpreted broadly to include matters relating to health, private behaviour, home life or personal or family relationships of individuals.⁵
16. The document is a letter of caution provided to a building practitioner concerning allegations they had breached the *Building Act 1993* (Vic) (**Building Act**) and the outcome of the Agency's inquiries or investigation.
17. The document contains the personal affairs information of a building practitioner and an Agency officer. Given the purpose and content of the document, which is addressed to the building practitioner, I am satisfied it predominantly contains their personal affairs information.

Would disclosure of the personal affairs information be unreasonable?

18. The concept of 'unreasonable disclosure' involves balancing the public interest in the disclosure of official information with the interest in protection and individual's personal privacy in the particular circumstances.
19. In *Victoria Police v Marke*,⁶ 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'.⁷ The Court further held, '[t]he protection of privacy, which lies at the heart of [section] 33(1), is an important right that the FOI Act properly protects. However, an individual's privacy can be invaded by a lesser or greater degree'.⁸
20. In determining whether disclosure of the personal affairs information would be unreasonable in the circumstances, I have considered the following factors:

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

The document is letter from the Agency to a building practitioner concerning allegations that they breached the Building Act. The purpose of the letter, which is known to the Applicant, was to issue a written caution to the building practitioner.

² Section 33(9).

³ *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].

⁴ *Hanson v Department of Education and Training* [2007] VCAT 123.

⁵ *Re F and Health Department* (1988) 2 VAR 458 as quoted in *RFJ v Victoria Police FOI Division* [2013] VCAT 1267 at [103].

⁶ [2008] VSCA 218 at [76].

⁷ *Ibid.*

⁸ *Ibid* at [79].

The document forms part of the Agency's procedural fairness process in its compliance and enforcement policy.⁹ While the Applicant is aware of the outcome of their complaint made to the Agency, I consider the letter issued to the subject of the complaint is sensitive and personal in nature, given it concerns the Agency's compliance and enforcement processes for building practitioners.

(b) The Applicant's interest in the information

The FOI Act provides a general right of access that 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 under section 33(1).¹⁰

The Applicant states they require the document for use in legal proceedings and to understand the details of the caution issued to the building practitioner in relation to works carried out on the Applicant's property.

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

I am not satisfied a public interest would be promoted by release of the document. Rather, disclosure would serve the Applicant's personal interest only.

While there is a public interest in a complainant being advised of the outcome of their complaint made to the Agency to ensure it is properly carrying out its statutory regulatory and enforcement functions under the Building Act, I am satisfied the Applicant received notice from the Agency of the outcome of the allegations made, including that the building practitioner received a letter of caution.

(d) The likelihood of disclosure of information, if released

As the FOI Act does not place any restrictions on an applicant's use or dissemination of documents obtained under FOI, this is to be interpreted by reference to the capacity of any member of the public to identify a third party.¹¹

Accordingly, I have considered the likelihood of the personal affairs information in the document being further disseminated, if disclosed, and the effects broader disclosure of this information would have on the personal privacy of the relevant third party.

I am satisfied the document is likely to be disseminated for use in legal proceedings should access be granted, which would impact the personal privacy of the building practitioner.

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

In determining whether disclosure of a document would involve the unreasonable disclosure of a third party's personal affairs information, an agency must notify that person (or their next of kin, if deceased) an FOI request has been received for documents containing their personal information and seek their view as to whether disclosure of the document should occur.¹² However, this obligation does not arise in certain circumstances, including where it is not practicable to do so.¹³

⁹ See 'Compliance and Enforcement Policy' at <https://www.vba.vic.gov.au/about/policies-procedures>.

¹⁰ *Victoria Police v Marke* [2008] VSCA 218 at [104].

¹¹ *Ibid* at [68].

¹² Section 33(2B).

¹³ Section 33(2C).

There is no information before me concerning the views of the relevant third party in relation to disclosure of the document. Having considered the content of the document and the circumstances in which it was created, I consider it is reasonably likely the third party would object to the disclosure of their personal affairs information in the document under the FOI Act.

(f) Whether disclosure of the information would or would be reasonably likely to endanger the life or physical 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 consider whether the disclosure of the information would, or would be reasonably likely to, endanger the life or physical safety of any person.¹⁴ I do not consider this is a relevant factor in this matter.

21. Having weighed up the above factors, on balance, I am satisfied disclosure of the third party's personal affairs information in the document would be unreasonable in the circumstances. Accordingly, I am satisfied the document is exempt from release under section 33(1).

Section 25 – Deletion of exempt or irrelevant information

22. 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.
23. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'¹⁵ 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 25.¹⁶
24. I have considered the effect of deleting exempt information from the document. I am satisfied it is not practicable to do so as it would render the document meaningless.

Conclusion

25. On the information before me, I am satisfied the document is exempt from release under section 33(1).
26. 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 refused in full.

Review rights

27. 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.¹⁷
28. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹⁸

¹⁴ Section 33(2A).

¹⁵ *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].

¹⁶ *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].

¹⁷ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

¹⁸ Section 52(5).

29. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹⁹
30. Information about how to apply to VCAT is available online at www.vcat.vic.gov.au. Alternatively, VCAT may be contacted by email at admin@vcat.vic.gov.au or by telephone on 1300 018 228.
31. 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.²⁰

When this decision takes effect

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

¹⁹ Section 52(9).

²⁰ Sections 50(3F) and 50(3FA).