

Notice of Decision and Reasons for Decision

Applicant:	'ET4'
Agency:	Victorian Building Authority
Decision date:	26 August 2022
Exemptions considered:	Sections 30(1), 33(1), 35(1)(b)
Citation:	'ET4' and Victorian Building Authority (Freedom of Information) [2022] VICmr 204 (26 August 2022)

FREEDOM OF INFORMATION – regulatory documents – consumer complaint – alleged misconduct of registered practitioner – statutory investigation – *Building Act 1993* (Vic) – investigation report – findings and recommendations – information communicated in confidence – third party personal affairs information – internal working document – review of agency fresh decision

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 fresh decision to refuse access to a document requested by the Applicant under the FOI Act.

My decision on the Applicant's request differs from the Agency's decision in that I have decided to release additional information in the document.

While I am satisfied certain information in the document is exempt from release under sections 33(1) and 35(1)(b), I am not satisfied information is exempt from release under section 30(1).

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

A marked-up copy of the document indicating information to be released to the Applicant has been provided to the Agency.

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner
26 August 2022

Reasons for Decision

Background to review

1. The Applicant engaged a person to [undertake works] at their home. Subsequently, the Applicant made a complaint to the Agency about the works undertaken.
2. The Agency conducted an investigation into the Applicant's complaint in accordance with its functions, including the regulation of licensed building practitioners and plumbers under the *Building Act 1993* (Vic) (**Building Act**).
3. The Applicant made an FOI request to the Agency seeking access to an investigation report arising from their complaint.
4. The Agency identified the requested report and refused access to the document in full under sections 30(1), 33(1), 35(1)(b), and 38 in conjunction with section 229J of the *Building Act 1993* (Vic) (**Building Act**).
5. The Agency's decision letter sets out the reasons for its decision.

Review application

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

Preliminary view

11. Following a preliminary view of the document and the basis upon which the Agency refused access to it, in particular, under section 38 in conjunction with section 229J of the Building Act, OVIC staff advised the Agency that section 229J of the Building Act is not a secrecy provision for the purpose of section 38 of the FOI Act.
12. The Agency was invited to make a fresh decision on the Applicant's FOI request under section 49M(1), provide OVIC with a submission setting out its view on the issue, or rely on its original decision. The Agency elected to make a fresh decision.
13. On [date], the Agency made a fresh decision in which it determined to release further information in the document. In doing so, the Agency refused access to certain information under sections 30(1), 33(1) and 35(1)(b).

14. The Applicant did not agree with the Agency's fresh decision and, as required by section 49MA(2), I proceeded with my review on the basis of the fresh decision.

Review of exemptions

15. I first consider the application of section 33(1), followed by sections 35(1)(b) and 30(1).

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

16. Following the Agency's fresh decision, the Applicant confirmed that they do not seek access to the personal affairs information of Agency officers in the document. However, they seek access to the names and personal affairs information of other third parties to which access was refused by the Agency.
17. A document is exempt from release 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'.
18. 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
19. A third party's opinion or observations about another person's conduct can constitute information related to the third party's personal affairs.³
20. 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.⁴

Does the document contain a third party's personal affairs information?

21. I am satisfied the document contains the personal affairs information of third parties, such as their names and personal accounts of events. While the names of the persons could be removed, I am satisfied one of the third parties could be identified from information contained in the document.
22. In some places, the personal affairs information of third parties is intertwined with information provided in confidence to the Agency, as discussed under section 35(1)(b) below.

Would disclosure of the personal affairs information be unreasonable?

23. The concept of 'unreasonable disclosure' involves determining whether the public interest in disclosure of official information is outweighed by the interest in protecting the personal privacy of a third party in the particular circumstances.
24. The Victorian Court of Appeal in *Victoria Police v Marke*,⁵ held there is 'no absolute bar to providing access to documents which relate to the personal affairs of others', and 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'. Further, '[t]he

¹ Sections 33(1) and 33(2).

² Section 33(9).

³ *Richardson v Business Licensing Authority* [2003] VCAT 1053, cited in *Davis v Victoria Police (General)* [2008] VCAT 1343 at [43], *Pritchard v Victoria Police (General)* [2008] VCAT 913 at [24], *Mrs R v Ballarat Health Services (General)* [2007] VCAT 2397 at [13].

⁴ *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].

⁵ [2008] VSCA 218 at [76].

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 to a lesser or greater degree'.⁶

25. While the Applicant likely already knows the identity of a third party, the release of their personal affairs information in the document may still be unreasonable.⁷
26. It has been held that the more sensitive information is in nature, the more likely its disclosure will be unreasonable.⁸
27. In determining whether the release of the personal affairs information of the third parties, excluding that of Agency officers, would be unreasonable in this matter, I have considered the following factors:

(a) The nature and circumstances in which the information was obtained

The document contains the personal affairs information of third parties. The relevant information was provided to and documented by the Agency for the sole purpose of investigating the Applicant's complaint in accordance with its statutory functions under the *Building Act 1993* (Vic). In such circumstances, I consider the personal affairs information of third parties appears in an investigative context and is sensitive in nature.

Further, as detailed in relation to section 35(1)(b) below, I am satisfied some of the information was obtained in confidence by the Agency given the nature and purpose of the document.

(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 in the circumstances.

As stated above, the Applicant made a complaint to the Agency about the works undertaken at their home. The Agency investigated the complaint and prepared an investigation report. As such, I accept the Applicant has a personal interest in obtaining access to the report.

In its fresh decision, the Agency granted access in part to the document, which resulted in the Applicant obtaining access to certain information. The Applicant seeks a full copy of the investigation report concerning their complaint made to the Agency.

The Applicant has confirmed they are seeking access to the document for a civil claim proceeding [contextual information redacted].

(c) The extent to which the information is available to the public

I do not consider the document is available to the public.

(d) Whether any public interest would be promoted by disclosure

Broadly speaking, I am of the view there is legitimate public interest in the community being informed about the way in which an agency responds to complaints. There is also a public interest in a complainant being informed as to the outcome of a regulatory investigation, noting the level of detail provided may differ from case to case.

⁶ [2008] VSCA 218 at [79].

⁷ *AB v Department of Education and Early Childhood Development* [2011] VCAT 1263 at [58]; *Akers v Victoria Police* [2003] VCAT 397.

⁸ [2011] VCAT 1263 at [58].

However, this must be balanced with the public interest in maintaining the confidentiality of such matters where disclosure of information provided in confidence may inhibit an agency from effectively conducting regulatory investigations in the future and obtaining information on a voluntary basis from a registered practitioner or other person. In the circumstances of this matter, I do not consider the broader public interest would be promoted by disclosure of third parties' personal affairs information.

[Contextual information redacted].

Accordingly, I am of the view the Applicant's interest in obtaining access to the document is a matter of private interest and would not promote a public interest.

(e) Whether the third parties consent or object to disclosure of their personal affairs 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 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.⁹ However, this obligation does not arise in certain circumstances, including where it is not practicable to do so.¹⁰

The Agency advised it did not consult with the third parties as it was not practicable to do so. In the Agency's view, the relevant third parties would be reasonably likely to object to disclosure of their personal affairs information under the FOI Act.

Having reviewed the document and considered the context of this matter, including the purpose for which their personal affairs information was recorded in the document, I agree the third parties would likely object to the disclosure of their personal affairs information under the FOI Act.

While the views of a third party are a relevant consideration, they are not determinative.

(f) Whether disclosure of the information would or would be reasonably likely to endanger the life or physical safety of any person¹²

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.¹³

There is no information before me to indicate this is a relevant consideration in this matter.

28. Having weighed up the above factors, on balance, I am satisfied disclosure of the third parties' personal affairs information would be unreasonable in the circumstances. In summary, the names of the third parties are not publicly known and appear in a document that records information gathered during an investigation conducted by the Agency in exercising its functions under the Building Act. In this context, I consider the personal affairs information is sensitive. I also accept certain personal affairs information was provided in confidence by the third parties in response to the Agency's regulatory investigation with a reasonable expectation it would not be released under the FOI Act.
29. Accordingly, I am satisfied the relevant personal affairs information is exempt from release under section 33(1).

⁹ Section 33(2B).

¹⁰ Section 33(2C).

30. A marked up copy of the document has been provided to the Agency detailing my decision on the application of section 33(1).

Section 35(1)(b) – Information obtained in confidence

31. A document is exempt from release 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
 - (b) 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 obtained in confidence?

32. Whether information communicated by an individual was communicated in confidence is a question of fact.¹¹ When determining whether information was communicated in confidence, it is necessary to consider the position from the perspective of the communicator.¹² Further, confidentiality can be express or implied from the circumstances of the matter.¹³
33. The Agency states in its fresh decision that the document contains information communicated in confidence given:
- (a) the nature of the information in the document;
 - (b) the purpose for which the document was created or provided to the Agency as part of its statutory functions; and
 - (c) the statutory framework in which the information was provided, which in the present matter includes section 229J(1) of the Building Act.
34. The Agency also submits the Victorian Civil and Administrative Tribunal (**VCAT**) has held that there is an obligation of confidentiality imposed by section 229J of the Building Act,¹⁴ which supports its view that the document contains information provided to the Agency in confidence.
35. Having considered the information in the document and the circumstances in which it was voluntarily provided to the Agency by the third parties during an interview with an Agency officer, I am satisfied the information provided was communicated with expectation of confidentiality.
36. Accordingly, I am satisfied certain information in the document was obtained in confidence by the Agency from third parties.
37. However, I am not satisfied procedural or administrative information recorded in the document by the Agency officer responsible for the investigation meets the requirements for information communicated to the Agency in confidence for the purpose of section 35(1)(b).

Would disclosure of the information be contrary to the public interest?

38. The public interest test in section 35(1)(b) is narrow and concerns consideration of whether the Agency would be impaired from obtaining similar information in the future if the requested information were to be disclosed under the FOI Act.

¹¹ *Ryder v Booth* [1985] VR 869 at 883; *XYZ v Victoria Police* [2010] VCAT 255 at [264].

¹² *XYZ v Victoria Police* [2010] VCAT 255 at [265].

¹³ *Ibid.*

¹⁴ *Currie v Building Commission* [2008] VCAT 979; *Mond v Building Commission of Victoria* [2012] VCAT 796.

39. 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 the Agency in the future should the information be disclosed.
40. The exemption under section 35(1)(b) will not be made out if an agency's impairment goes no further than potential communicators of similar information would be less candid than they would otherwise have been.¹⁵
41. In its fresh decision, the Agency states disclosure of the document would impair its ability to obtain information of a similar quality in future, and the need to protect the public interest in ensuring the Agency's ability to properly investigate and deal with matters has been recognised by VCAT in the context of similar investigatory processes by bodies in the building industry succeeded by the Agency.¹⁶
42. I accept the Agency relies on information provided voluntarily by third parties in investigating complaints made under the Building Act. Obtaining the cooperation of witnesses and persons the subject of a complaint is an important aspect of the Agency being able to carry out its regulatory functions efficiently and effectively under the Building Act.
43. If such persons were aware that the information they provide as part of an investigation report would be disclosed in response to an FOI request, they would be unlikely to communicate similar information to the Agency in the future. I consider this would impede the ability of an Agency to fully investigate complaints in a timely manner.
44. In this case, I am satisfied disclosure of information communicated in confidence 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.
45. Accordingly, I am satisfied certain information is exempt from release under section 35(1)(b), while other information that is not exempt from release under section 35(1)(b) is to be released.
46. A marked up copy of the document has been provided to the Agency detailing my decision on the application of section 35(1)(b).

Section 30(1) – Internal working documents

47. A document will be exempt under section 30(1) if the following three requirements are met:
 - (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.
48. The exemption does not apply to purely factual material in a document.¹⁷

¹⁵ *Smeaton v Victorian WorkCover Authority* [2012] VCAT 1549 at [69] approving *Birnbauer v Inner and Eastern Health Care Network* [1999] 16 VAR 9.

¹⁶ *Currie v Building Commission* [2008] VCAT 979; *Mond v Building Commission of Victoria* [2012] VCAT 796.

¹⁷ Section 30(3).

Does the document contain purely factual information?

49. I am satisfied certain information in the document is purely factual in nature and is not exempt information by virtue of section 30(3). This information is to be released to the Applicant.

Does the document disclose matters in the nature of opinion, advice or recommendations prepared by an officer, or consultation or deliberation that has taken place between officers?

50. The term officer of an Agency' is defined in section 5(1). It includes a member of an agency, a member of the agency's staff, and any person employed or engaged by the agency, whether or not they are subject to the *Public Administration Act 2004* (Vic).
51. I am satisfied the document was prepared by an Agency officer and contains information in nature of opinion and recommendations provided by, or reflects the deliberation of and between, Agency officers.

Was the opinion, advice, recommendation, consultation or deliberation provided in the course of, or for the purpose of, the deliberative processes of the Agency?

52. The term 'deliberative process' is interpreted broadly and includes any of the processes of deliberation or consideration involved in the functions of an agency, Minister or government.¹⁸
53. In *Re Waterford and Department of Treasury (No.2)*,¹⁹ 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.

54. I am satisfied the document was prepared in the course of, or for the purpose of, the deliberative processes of the Agency in investigating a complaint made under the Building Act.

Would disclosure of the document be contrary to the public interest?

55. Determining whether disclosure of the document would be contrary to the public interest requires a 'process of the weighing against each other conflicting merits and demerits'.²⁰
56. In doing so, I have considered the following factors in the context of this case:
- (a) the right of every person to gain access to documents under the FOI Act;
 - (b) the FOI Act does not place restrictions on an applicant's use or dissemination of documents obtained under the FOI Act;
 - (c) the degree of sensitivity of the issues involved, in the context of the Agency's investigation functions;
 - (d) the right of the Applicant to be broadly informed about the outcome of the Agency's investigation into their complaint; and

¹⁸ *Brog v Department of Premier and Cabinet* (1989) 3 VAR 201 at 208.

¹⁹ [1984] AATA 67; (1984) 5 ALD 588; 1 AAR 1 at [58].

²⁰ *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].

- (e) the public interest in ensuring regulatory investigations are adequately documented by Agency officers, conducted fairly and with the necessary degree of confidentiality to provide for the voluntary provision of information by witnesses and persons the subject of an investigation.
57. I consider there are factors that weigh both in favour and against disclosure.
58. In its fresh decision, the Agency determined disclosure would be contrary to the public interest as it would have an adverse effect on the integrity or effectiveness of decision making, investigative or other processes, and in the context of regulatory investigation processes, documents that disclose steps described in evidence gathering and analysis of responses if disclosed would undermine the future effectiveness of those processes.²¹
59. I accept there is a public interest in maintaining an Agency's ability to obtain information from third parties in relation to complaints to allow appropriate investigation.
60. There is also a strong public interest in ensuring complaints are appropriately investigated through transparency of government process and the communication of outcomes.
61. The Applicant advised OVIC staff the Agency did not communicate to them the outcome of the Agency's investigation. When contacted by OVIC staff, the Agency advised it sent a 'close out' letter to the Applicant on [date] at the completion of its investigation.
62. As detailed above in my consideration of sections 33(1) and 35(1)(b), I acknowledge the Applicant's personal interest in obtaining access to the document given it relates to a complaint they made to the Agency. However, this does not equate to a right of access to the entire investigation report.
63. On balance, I have determined disclosure of certain information to which the Agency refused access under section 30(1) would not be contrary to the public interest for the following reasons:
- (a) While I accept the document contains some sensitive information, I must consider a range of factors in determining whether disclosure would be contrary to the public interest.
 - (b) In my view, certain information in the document is largely factual in nature.
 - (c) The Agency's findings and recommendations in the document appear to be final and not subject to change.
 - (d) Should the Agency consider disclosure of the information to be released would lead to any misunderstanding by the Applicant or the public more generally, it is open to the Agency to release the document with any necessary additional information to eliminate or minimise any confusion or misunderstanding concerning the document or to place the document into context.
 - (e) I do not consider disclosure of information in the document would impair the Agency's ability to carry out or fulfil its statutory functions and obligations.
64. Accordingly, I am satisfied certain information in the document is not exempt from release under section 30(1).

Section 25 – Deletion of exempt or irrelevant information

65. 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.

²¹ *Frugtniet v Legal Services Board* [2014] VCAT 1299 at [66].

66. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'²² 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 25.²³
67. I have considered whether it is practicable to provide the Applicant with an edited copy of the document with irrelevant and exempt information deleted in accordance with section 25. I am satisfied it is practicable to do so, as it would not require an unreasonable amount of time or effort, and the edited document would retain meaning.

Conclusion

68. On the information before me, I am satisfied certain information in the document is exempt from release under sections 33(1) and 35(1)(b), however, I am not satisfied information is exempt from release under section 30(1).
69. As I am satisfied it is practicable to provide the Applicant with an edited copy of the document with irrelevant and exempt information deleted in accordance with section 25, access to the document is granted in part.
70. A marked-up copy of the document indicating information to be released to the Applicant has been provided to the Agency.

Review rights

71. If either party to this review is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.²⁴
72. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.²⁵
73. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.²⁶
74. 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.
75. 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.²⁷

When this decision takes effect

76. My decision does not take effect until the third parties' 60 day review period expires.
77. If a review application is made to VCAT, my decision will be subject to any VCAT determination.

²² *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].

²³ *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].

²⁴ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

²⁵ Section 52(5).

²⁶ Section 52(9).

²⁷ Sections 50(3F) and 50(3FA).