

Notice of Decision and Reasons for Decision

Applicant:	'E13'
Agency:	Department of Transport
Decision date:	10 March 2022
Exemptions and provision considered:	Sections 33(1), 31(1)(a), 34(1)(b), 25
Citation:	'E13' and Department of Transport (<i>Freedom of Information</i>) [2022] VICmr 103 (10 March 2022)

FREEDOM OF INFORMATION – VicRoads document – regulatory action – [vehicle testing] – complaint – *Road Safety Act 1986* (Vic) – investigation outcome – personal affairs information

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 differs from the Agency's decision as I have determined to release information in the document where I am satisfied it is not exempt from release.

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 exempt and irrelevant information will be provided to the Agency.

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner

10 March 2022

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency seeking access to documents following a complaint they made to the Agency regarding the conduct of [a third party]. Their complaint concerns a company and individuals who they complained issued a 'false' roadworthy certificate for a motor vehicle.
2. Following consultation with the Agency, the Applicant clarified the terms of their request to:

Any documentation that outlines the findings of the panel and the reasons for any decisions made with respect to the complaint [reference number] and whether any penalty may have been issued against [business name]
3. The Agency identified one document falling within the terms of the Applicant's request and refused access to certain information in the document under section 33(1). 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. In their review application, the Applicant narrowed the scope of the information to which they seek information which would confirm whether a penalty was issued to the [third party] for issuing a 'false' roadworthy certificate or provide details of the nature of any penalty. Further, they clearly state they do not seek access to personal details or details of any 'Show Cause' submission made by the [third party] during the Agency's complaint investigation.
6. I have examined a copy of the document subject to review. It is an official letter sent by the Agency to the [third party] setting out the Agency's decision in relation to an investigation it conducted into the issuing of a roadworthy certificate by [the third party].
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.
11. In completing a review under section 49F, I am required by section 49P to make a fresh or new decision. This means my review does not involve determining whether the Agency's original decision is correct, but rather I am required to ensure my fresh decision is the 'correct or preferable decision'. This involves ensuring my decision is correctly made under the FOI Act and any other relevant applicable law in force at the time of making my fresh decision.

Review of exemptions

Section 25 – Irrelevant information

12. As stated above, the Applicant does not seek access to personal details or details of the company's 'Show Cause' submission made by the [third party] during the Agency's complaint investigation.
13. In reviewing the document, I consider only certain parts are relevant to the specific terms of the Applicant's review application, namely any information that concerns whether the [third party] was penalised by the Agency and the nature of any penalty imposed.
14. In respect of those parts of the document that are relevant to the requested information, I have considered the application of the following exemptions: section 33(1), 31(1)(a) and 34(1)(b) below.

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

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

Does the document contain personal affairs information of a third party?

16. 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.²
17. The document contains information that relates to allegations made about an individual who is or owns a [third party]. I am satisfied this information constitutes 'personal affairs information' for the purpose of section 33(1).
18. Based on the terms of the Applicant's request, I accept they are likely to know the identity of the third party. Even where an applicant claims to know the identity of a third party, disclosure of the third party's personal affairs information under the FOI Act may still be unreasonable in the circumstances.³

Would disclosure of the personal affairs information be unreasonable?

19. In its decision letter provided to the Applicant in relation to their FOI request, the Agency states:

I have made this decision because the document identifies or is reasonably likely to identify individuals, and it is unreasonable to disclose this information because:

- The document contains sensitive personal affairs information of individuals;
- The information pertains to a licence issued to an individual and actions taken by the Department of Transport in relation to that licence; and

¹ Sections 33(1) and 33(2).

² *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].

³ *AB v Department of Education and Early Childhood Development* [2011] VCAT 1263 at [58]; *Akers v Victoria Police* [2003] VCAT 397.

- The personal affairs information as recorded in the document is not publicly available, or otherwise open to access by a third party.

In these circumstances, I am satisfied that the protection of individual privacy outweighs the right of access provided by the FOI Act.

20. The concept of 'unreasonable disclosure' involves balancing the public interest in the disclosure of official information with the interest in protecting an individual's personal privacy in the particular circumstances of a matter.
21. In *Victoria Police v Marke*,⁴ 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'.⁵ The Court further held, '[t]he protection of privacy, which lies at the heart of [section] 31, is an important right that the FOI Act properly protects. However, an individual's privacy can be invaded by a lesser or greater degree'.⁶
22. 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 personal affairs information largely relates to the third party who was the subject of a complaint made by the Applicant to VicRoads in relation to carrying out a vehicle roadworthy inspection.

The document includes details as to whether the Agency made any finding against and imposed a penalty on the third party.

I accept information in the document would be sensitive for the third party given it concerns their personal information and business information.

The information was obtained and recorded in the document by the Agency in the context of it exercising its regulatory functions under the *Road Safety Act 1986* (Vic) and related Regulations.

(b) The Applicant's interest in the information and whether their purpose for seeking the information is likely to be achieved by disclosure

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).⁷

The Applicant states they seek access to the document for the purpose of pursuing legal action against the [third party]. Accordingly, the Applicant's interest in obtaining access to certain information in the document would serve a personal interest.

Having reviewed the document and noting the Applicant does not seek access to all information it contains, I consider its disclosure in edited form would provide them with the

⁴ [2008] VSCA 218 at [76].

⁵ Ibid.

⁶ Ibid at [79].

⁷ *Victoria Police v Marke* [2008] VSCA 218 at [104].

opportunity to seek legal advice regarding the merits or otherwise of taking any legal action in relation to the conduct of the [third party].

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

The Applicant did not provide any information as to any public interest that would be promoted by release of the personal affairs information of the third party in the document.

In these circumstances, I consider there is a public interest in a complainant having access to information in relation to the outcome of their complaint made to the Agency regarding any findings made and regulatory action taken by the Agency in accordance with its regulation functions and powers under the *Road Safety Act 1986* (Vic) and related Regulations.

In doing so, while I note the outcome of the Agency's investigation is not publicly available, I do not consider the regulatory functions of the Agency would be hindered or impaired in any way by its disclosure in edited form in this case.

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

The Agency determined consultation with the relevant third parties in relation to their views on release of their personal affairs information would be unreasonable in the circumstances.

On the information before me, I consider it is likely the third party would not consent to the disclosure of their personal affairs information in the document under the FOI Act. While this is a relevant factor, it is not a determinative factor.

(e) Whether disclosure of the information would or would be reasonably likely to endanger the life or physical safety of any person⁸

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 disclosure of the information would, or would be reasonably likely to, endanger the life or physical safety of any person.⁹

On the information before me, I do not consider this is a relevant factor in this matter.

23. Having weighed up the above factors, on balance, I am satisfied disclosure of the specific personal affairs information of the third party, which is sought by the Applicant on review would not be unreasonable in the circumstances and is not exempt from release under section 33(1).

Section 31(1)(a) – Disclosure would prejudice the enforcement or proper administration of the law

24. While the Agency does not rely upon section 31(1)(a), I have also considered its application for completeness.
25. Section 31(1)(a) provides, subject to section 31, a document is an exempt document if its disclosure would, or would be reasonably likely to prejudice:
- (a) investigation of a breach or possible breach of the law; or
 - (b) the enforcement or proper administration of the law in a particular instance.

⁸ Section 33(2A).

⁹ Section 33(2A).

26. 'Reasonably likely' means there is a real chance of an event occurring; it is not fanciful or remote.¹⁰
27. 'Prejudice' means to hinder, impair or undermine and includes actual prejudice as well as impending prejudice.¹¹
28. 'In a particular instance' does not require a single specific investigation. This phrase can encompass specific, identified aspects of law, administration of law or investigations of breaches or potential breaches of law.¹²
29. Noting the Applicant seeks access to specific information in the document as to whether the [third party] was penalised by the Agency and the nature of any penalty imposed, I am satisfied disclosure of the specific information sought by the Applicant on review would not prejudice the enforcement or proper administration of the law in this instance.
30. Accordingly, I am satisfied the relevant information is not exempt from release under section 31(1)(a).

Section 34(1) – Information acquired from a business undertaking

31. While the Agency does not rely upon section 34(1), I have also considered its application for completeness.
32. A document will be an exempt document under section 34(1)(b), if it contains information:
 - (a) acquired from a business undertaking;
 - (b) that relates to matters of a business, commercial or financial nature; and
 - (c) the disclosure of which, having regard to the matters listed in section 34(2), would be likely to expose the business undertaking unreasonably to disadvantage.
33. In *Thwaites v Department of Human Services*,¹³ VCAT observed the phrase 'information acquired' in section 34(1) signifies the need for some positive handing over of information in some precise form.
34. VCAT has recognised the words 'business, commercial or financial nature' have their ordinary meaning.¹⁴
35. Section 34(2) provides:

In deciding whether disclosure of information would expose an undertaking unreasonably to disadvantage, for the purposes of paragraph (b) of subsection (1), an agency or Minister may take account of any of the following considerations—

- (a) whether the information is generally available to competitors of the undertaking;
- (b) whether the information would be exempt matter if it were generated by an agency or a Minister;
- (c) whether the information could be disclosed without causing substantial harm to the competitive position of the undertaking; and
- (d) whether there are any considerations in the public interest in favour of disclosure which outweigh considerations of competitive disadvantage to the undertaking, for instance, the public

¹⁰ *Bergman v Department of Justice Freedom of Information Officer* [2012] VCAT 363 at [65], quoting *Binnie v Department of Agriculture and Rural Affairs* [1989] VR 836.

¹¹ *Bergman v Department of Justice Freedom of Information Officer* [2012] VCAT 363 at [66], referring to *Sobh v Police Force of Victoria* [1994] VicRp 2; [1994] 1 VR 41 at [55].

¹² *Cichello v Department of Justice (Review and Regulation)* [2014] VCAT 340 at [24].

¹³ (1999) 15 VAR 1.

¹⁴ *Gibson v Latrobe CC* [2008] VCAT 1340 at [25].

interest in evaluating aspects of government regulation of corporate practices or environmental controls -

and of any other consideration or considerations which in the opinion of the agency or Minister is or are relevant.

Was the information acquired from a business undertaking?

36. In relation to the first requirement, I am satisfied in conducting an investigation into the complaint, the [third party], which operates as a company, provided information to the Agency in response to its investigation upon.
37. However, noting the Applicant seeks access to specific information in the document as to whether the [third party] was penalised by the Agency and the nature of any penalty imposed, I am satisfied the specific information sought by the Applicant on review was not acquired from the [third party], but constitutes information conveyed by the Agency to the [third party].
38. Accordingly, I am not satisfied this requirement of section 34(1)(b) is met.

Does the information relate to matters of a business, commercial or financial nature?

39. For completeness, I will continue to consider the second and third requirements of section 34(1)(b).
40. Having reviewed the information subject to review, I accept the document contains information that relates to matters of a business nature in that they concern the conduct of the [third party], which operates as a company.

Would disclosure of the information expose the business undertaking unreasonably to disadvantage?

41. I consider section 34(1)(b) contemplates a business undertaking may be exposed to a certain measure of disadvantage should information of a business, commercial or financial nature be disclosed under the FOI Act. The relevant question is whether any such exposure would be unreasonable in the circumstances.
42. Based on the information before me, I am not satisfied release of the requested information in the document would expose the [third party] unreasonably to disadvantage for the following reasons:
 - (a) While I acknowledge the information about the [third party] is not publicly available and the documents contain what may appear to be sensitive information regarding the operation of the business which may impact upon its reputation, I consider the information can be disclosed without causing substantial harm to the 'competitive' position of the undertaking.
 - (b) The [third party] operates in a regulated environment under the *Road Safety Act 1986* (Vic) and related Regulations.
 - (c) Given the requested information relates to the Agency's regulatory functions under the *Road Safety Act 1986* (Vic) and related Regulations, I consider there is a public interest in evaluating aspects of the Agency's regulation and enforcement of this legislation which is critical to maintaining public safety and confidence in carrying out its functions.
 - (d) While I consider the [third party] would be likely to object to release of the requested information, its views are not determinative and are only one factor to be considered.
43. Accordingly, based on the above factors, I am satisfied disclosure of the relevant information in the document would not expose the [third party] unreasonably to disadvantage and is not exempt from release under section 34(1)(b).

Section 25 – Deletion of exempt or irrelevant information

44. 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.
45. 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
46. I have considered whether it is practicable to provide the Applicant with an edited copy of the document with exempt an irrelevant information deleted in accordance with section 25. I am satisfied it is practicable to do so as it would not require substantial time and effort, and the edited document would retain meaning.

Conclusion

47. My decision on the Applicant’s request differs from the Agency’s decision as I have determined to release information in the document where I am satisfied it is not exempt from release.
48. 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.
49. A marked-up copy of the document indicating exempt and irrelevant information will be provided to the Agency.

Review rights

50. 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
51. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹⁸
52. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹⁹
53. 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.
54. 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

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).

¹⁹ Section 52(9).

²⁰ Sections 50(3F) and 50(3FA).

Third party review rights

55. As I have determined to release the personal affairs information of a third party, if practicable, I am required to notify them of their right to seek review by VCAT of my decision within 60 days from the date they are given notice.²¹
56. In this case, I am satisfied it is practicable to notify the third party of their review rights and confirm they will be notified of my decision.

When this decision takes effect

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

²¹ Sections 49P(5), 50(3) and 52(3).