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Information Commissioner

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## Notice of Decision and Reasons for Decision

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Applicant: 'ES7'  
Agency: Department of Justice and Community Safety  
Decision date: 16 August 2022  
Exemptions considered: Section 35(1)(b)  
Citation: 'ES7' and Department of Justice and Community Safety (Freedom of Information) [2022] VICmr 198 (16 August 2022)

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FREEDOM OF INFORMATION – Patriotic Funds – trust deed – information provided in confidence – disclosure would impair agency's ability to obtain similar information in the future – contrary to public interest to release

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 in that I have decided to refuse access to the document in full.

The Schedule of Documents in **Annexure 1** sets out my decision in relation to each document.

My reasons for decision follow.

**Sven Bluemmel**

Information Commissioner

16 August 2022

## Reasons for Decision

### Background to review

1. The Applicant made a request to the Agency for access to certain documents relating to an application by [a named Patriotic Fund] (named below as 'the Association') to vary a trust deed. Following consultation with the Agency, the Applicant clarified the initial request and sought access to:
  1. The initiating documents provided by or on behalf of the Association regarding the abovementioned application in [year].
  2. Any further correspondence and documents provided by or on behalf of the Association regarding the above-mentioned application, limited to the period [date] to [date].
  3. Correspondence to the Association by or on behalf of Consumer Affairs Victoria or the Department of Justice and Community Safety in response to the above-mentioned application, limited to the period [date] to [date].
2. The Agency identified 12 documents falling within the terms of the Applicant's request and relied on the exemptions under sections 33(1) and 35(1)(a) to refuse access to information in the documents.

### Creation and approval of Patriotic Funds under the *Veterans Act 2005* (Vic)

3. The subject of the Applicant's FOI request is set out at paragraph 1 above.
4. In conducting my review, it is necessary to consider the context in which the requested documents were created and legislation that concerns the approval of Trust Deeds created to establish a Patriotic Fund.
5. Section 23 of the *Veterans Act 2005* (Vic) (**Veterans Act**), allows for the creation of privately managed trusts called Patriotic Trusts which hold assets raised 'for any purpose in connection with any service or duty as an officer or a member of the naval, military or air forces of Her Majesty or of the Commonwealth of Australia or of any of the naval, military or air forces of Her Majesty's allies.'<sup>1</sup>
6. Oversight of the creation and maintenance of Patriotic Trusts is given to the Director of Consumer Affairs Victoria (**CAV**),<sup>2</sup> which is a department of the Agency. CAV is required by the Veterans Act to ensure that any new or amended trust deed that concerns a Patriotic Trust is consistent with the purposes of Patriotic Trusts, as set out in the Veterans Act.<sup>3</sup> Accordingly, the Agency requires copies of relevant trust deeds to be submitted to it for formal approval.

### Review application

7. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
8. The Applicant indicated they only seek review of the decision in relation to Document 3, the Deed of Trust.
9. During the course of the review, the Agency advised it no longer relied on section 35(1)(a) to exempt Document 3 in full, instead relying on the exemption in section 35(1)(b).
10. Accordingly, this review relates to the application of section 35(1)(b) to Document 3.
11. I have examined a copy of the document subject to review.

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<sup>1</sup> Section 4 of the *Veterans Act 2005* (Vic).

<sup>2</sup> Ibid at section 33.

<sup>3</sup> Ibid at section 33A.

12. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
13. I have considered all communications and submissions received from the parties.
14. 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.
15. 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 exemptions

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

16. A document is exempt 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 (a **third party**); 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?*

17. Whether information communicated by an individual to an agency was communicated in confidence is a question of fact.<sup>4</sup>
18. In doing so, it is necessary to consider the position from the perspective of the communicator, noting confidentiality can be expressed or implied from the circumstances of a matter.<sup>5</sup>
19. The Agency submits:

...Document 3 was provided to the Department by the third party in a draft form specifically to seek advice from CAV. While there is an obligation under the Act to have deeds of this nature submitted and signed by the Registrar of CAV, there is no obligation to submit drafts for error checking or best practice development. The deed has not been marked confidential, however, this is not the threshold to establish whether a document was communicated in confidence. This was established in *Coors Pavey Whiting and Byrne*<sup>6</sup> that to make a case for confidentiality the source of the document must be specific, have the necessary quality of confidentiality (e.g. not common or public knowledge), and was received in a way to give an expectation of confidentiality.

Relevantly, the document is specific to the deed, it is not common or public knowledge, and it has had the expectation of confidentiality given in early draft form that was submitted for the purposes of seeking advice. In terms of any draft legal agreement, it is reasonable that until it is presented for general or common use with others, there would be a strong element of confidentiality placed on it. This is especially true, as it turned out in this matter, as the draft deed at Document 3 was never progressed with by the third party in that form.

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<sup>4</sup> *Ryder v Booth* [1985] VR 869 at [883]; *XYZ v Victoria Police* [2010] VCAT 255 at [264].

<sup>5</sup> *XYZ v Victoria Police* [2010] VCAT 255 at [265].

<sup>6</sup> *Coors Pavey Whiting and Byrne v Collector of Customs (Vic)* (1987) 14 FCR 434, 443

20. The Agency advised it considered it was not practicable to consult with the third party in this matter, however it did consult with CAV, which advised it considered third party consultation would not have led to further information being provided to the Applicant.
21. In the circumstances of this matter, I accept the relevant third parties provided information to the Agency with the expectation it would be used for the purpose of the Agency providing informal feedback prior to engaging with a formal statutory process. I consider it is reasonably likely the third party would not expect this information to be disclosed under the FOI Act.
22. Accordingly, I am satisfied the nature of their communication with the Agency falls within the scope of 'information communicated in confidence by a person to the Agency' for the purposes of section 35(1)(b).

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

23. Section 35(1)(b) also requires I consider whether the Agency would be impaired from obtaining similar information in the future if the information were to be disclosed under the FOI Act. 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.
24. The public interest test in section 35(1)(b) is narrow, in that it is directed toward the impact release would have on an agency's ability to obtain the same type of information in the future. I note the exemption will not be made out if an agency's impairment goes no further than showing potential communicators of the information may be less candid than they would otherwise have been.<sup>7</sup>
25. The Agency submits:

...while there is an obligation under the Act to have final deeds of this nature submitted and signed by the Registrar of CAV, there is no obligation to submit drafts for error checking or best practice development. That is what occurred here, a voluntary process that the third party was under no obligation to engage in and a process that CAV is keen to encourage. If draft, incomplete, or not ultimately followed through with contracts were prematurely released, it would significantly hinder CAV's ability to provide this early voluntary assistance.

The need for final contracts to be submitted to CAV and signed by the registrar are quite different to the voluntary process engaged in by this client on this draft deed. The draft deed did not continue in the form submitted to CAV, an excellent example where early consultation with the regulatory body that was voluntarily engaged prevented an inappropriate or incomplete final deed prematurely submitted for final endorsement as required by the Act. This process ultimately created a better outcome and was more efficient.

26. I accept there is a public interest in government approval of this type of document being subject to scrutiny. However, the public interest test in section 35(1)(b) is narrow. It is directed towards the impact release would have on an agency's ability to obtain the same type of information in the future. The provision does not permit me to have regard to other matters, such as any public interest in favour of release, or the extent to which the Applicant's personal interest in the documents would be served by granting access to the information.
27. I accept the Agency's submission that the confidential provision of documents of this type prior to formal review is desirable. Accordingly, I consider unrestricted and unconditional release of information of this nature has the potential to deter third parties from providing relevant and fulsome information. I consider this would be a significant and detrimental outcome that would impede the free flow of

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<sup>7</sup> *Smeaton v Victorian WorkCover Authority* [2012] VCAT 1549 at [69], approving *Birnbauer v Inner and Eastern Health Care Network* [1999] 16 VAR 9.

information provided to the Agency, which could reasonably impede the Agency's ability to provide assistance to stakeholders seeking informal advice regarding its regulatory functions.

28. On balance, I am satisfied section 35(1)(b) applies to the document.
29. The Schedule of Documents in **Annexure 1** outlines my decision in relation to section 35(1)(b).

### **Section 25 – Deletion of exempt or irrelevant information**

30. 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.
31. 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>
32. I have considered the effect of deleting exempt information from the document. In my view, it is not practicable for the Agency to delete exempt information, because to do so would render the document meaningless.

### **Conclusion**

33. On the information before me, I am satisfied Document 3 is exempt from release under section 35(1)(b).
34. As I am satisfied it is not practicable to provide the Applicant with an edited copy of the documents with exempt information deleted in accordance with section 25, access is refused in full.

### **Review rights**

35. 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>
36. 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>
37. 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>
38. 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.
39. 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>

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

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

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<sup>8</sup> *Mickelborough v Victoria Police (General)* [2009] VCAT 2786 [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 [26]; *RFJ v Victoria Police FOI Division (Review and Regulation)* [2013] VCAT 1267 at [140], [155].

<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).

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
1.	[date]	Cover email	1	Refuse in part Section 33(1)	Not subject to review	
2.	[date]	Attachment to document 1 – Cover letter	1	Refuse in part Section 33(1)	Not subject to review	
3.	[date]	Attachment to document 1 – Deed of Trust	15	Refuse in full Section 35(1)(b)	Refused in full Section 35(1)(b)	<p><b>Section 35(1)(b):</b> I am satisfied this document contain information that was communicated to the Agency from external third parties in circumstances where confidentiality can be implied. I am satisfied this information is exempt under section 35(1)(b) for the reasons set out above in the Notice of Decision.</p> <p><b>Section 25:</b> I am not satisfied it would be practicable to edit this document to delete information in accordance with section 25 as it would render the document meaningless.</p>
4.	[date]	Series of emails	12	Refuse in part Section 33(1) and s35(1)(a)	Not subject to review	

Document No.	Date of Document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
5.	[date]	Letter to [named individual] from applicant	2	Released in full	Not subject to review	
6.	[date]	Series of emails	6	Refuse in part Section 33(1) and s35(1)(a)	Not subject to review	
7.	[date]	Letter from [named individual] to CAV	2	Refuse in full Section 31(1)(a)	Not subject to review	
8.	[date]	Series of emails	13	Refuse in part Section 33(1) and s35(1)(a)	Not subject to review	
9.	[date]	Letter to CAV from [named individual]	9	Refuse in full Section 35(1)(a)	Not subject to review	
10.	[date]	Letter from [named individual] to CAV	2	Refuse in full Section 35(1)(a)	Not subject to review	
11.	[date]	Phillip Island Coastal Discovery Camp	13	Refuse in full Section 35(1)(a)	Not subject to review	
12.	[date]	Draft lease schedule	3	Refuse in full Section 35(1)(a)	Not subject to review	