

Notice of Decision and Reasons for Decision

Applicant:	'EY1'
Agency:	Hobsons Bay City Council
Decision date:	22 December 2022
Exemptions and provision considered:	Sections 33(1), 35(1)(b), 25
Citation:	'EY1' and Hobsons Bay City Council (Freedom of Information) [2022] VICmr 247 (22 December 2022)

FREEDOM OF INFORMATION – council documents – local government – complaint – dispute – personal affairs information – disclosure unreasonable – information provided in confidence – disclosure 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 in full to documents 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 certain information in the documents is not exempt from release and can be released to the Applicant. I have also decided to apply an additional exemption to certain documents.

I am satisfied information in the documents is exempt from release under sections 33(1) and 35(1)(b). However, where I am satisfied it is practicable to provide the Applicant with an edited copy of a document with exempt or irrelevant information deleted in accordance with section 25, access to that document is granted in part.

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

A marked-up copy of the documents indicating exempt or irrelevant information in accordance with my decision has been provided to the Agency.

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner

22 December 2022

Reasons for Decision

Background to review

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

... all complaints and communication made against myself or property from the home occupants at [address] over the past [number of years] for legal reasons.
2. The Agency identified 25 documents falling within the terms of the Applicant's request. Twelve documents were released outside the FOI Act, one document was released in full and the remaining documents were refused in full under section 33(1). The Agency's decision letter sets out the reasons for its decision.

Review application

3. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
4. I have examined a copy of the documents subject to review.
5. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
6. I have considered all communications and submissions received from the parties.
7. 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.
8. 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.
9. In conducting a review under section 49F, section 49P requires that I make a new or 'fresh decision'. Therefore, my review does not involve determining whether the Agency's decision is correct, but rather requires my fresh decision to be the 'correct or preferable decision'.¹ This involves ensuring my decision is correctly made under the FOI Act and any other applicable law in force at the time of my decision.

Preliminary view

10. On [date], OVIC provided the Agency with a preliminary view that on the available information section 33(1) had been too broadly applied and that certain information in the exempt documents could be released pursuant to section 25.
11. The Agency was invited to provide a further submission, make a fresh decision under section 49M or agree to release further information in the documents without making a fresh decision. It was also open to the Agency to rely on its decision letter and submission already made.
12. On [date], the Agency declined to release further information in the documents and provided a supplementary submission.

¹ *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577 at 591.

Review of exemptions

Section 33(1) – Documents affecting the personal privacy of a third party

13. 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**);² and
 - (b) such disclosure would be ‘unreasonable’.

Do the documents contain personal affairs information of a third party?

14. 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.³
15. 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.⁴
16. Personal affairs information in the documents comprises names, addresses and mobile telephone numbers relating to third party complainants. The documents disclose the nature of the complaints made and information from which a person’s identity, address or location can reasonably be determined. The documents also include the names, position titles, email addresses, and telephone numbers of Agency officers. I am satisfied this information is personal affairs information for the purposes of section 33(1).
17. However, in relation to information relating to the general nature of the complaints and action taken by the Agency, I do not consider this information constitutes the personal affairs information of a third party and is not exempt from release under section 33(1).

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 protecting the personal privacy of an individual in the particular circumstances.
19. In *Victoria Police v Marke*,⁵ 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’.⁶ 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’.⁷
20. In determining whether disclosure of the personal affairs information would be unreasonable in the circumstances, I have considered the following factors:

² Sections 33(1) and 33(2).

³ Section 33(9).

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].

⁶ *Ibid.*

⁷ *Ibid* at [79].

(a) The nature of the personal affairs information

I acknowledge the Applicant's submission that they know the name and address of certain third parties.

However, even where an applicant claims to know the identity of a third party, disclosure of the third party's personal affairs information in a document by an agency under the FOI Act may still be unreasonable in the circumstances.⁸

I accept certain personal affairs information in the documents is sensitive and personal in nature. The information was collected by the Agency in the course of carrying out its regulatory and enforcement functions in relation to investigating complaints in its local government area.

The personal affairs information relating to Agency officers was recorded in the course of them performing their professional duties and responsibilities as public sector employees, including the handling of complaints.

(b) The circumstances in which the information was obtained

The Agency obtained the information in connection with its regulatory and enforcement functions. In such circumstances, I am of the view the complainants provided their personal affairs information to the Agency on the understanding it was being collected for the purpose of the Agency carrying out its law enforcement and regulatory functions. I consider it is reasonably likely the complainant would not expect their personal affairs information would be disclosed by the Agency under the FOI Act.

(c) 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).⁹

During the review, the Applicant indicated they seek access to the documents to determine whether they will pursue legal action against some of the third parties.

I acknowledge the Applicant's interest in obtaining access to the information. However, this factor must be weighed against other relevant factors in an attempt to reconcile two important, but competing, objectives: the public interest in disclosure of information and the interest in protecting a third party's personal privacy.

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

As stated above, I acknowledge the Applicant's purpose for seeking access to the personal affairs information. However, I am not satisfied any public interest would be promoted by the disclosure of the complainant's personal affairs information to the Applicant.

Maintaining the confidentiality of information individuals voluntarily provide to the Agency in such matters is essential for the Agency to be able to receive and carry out its statutory functions under relevant legislation and local laws.

Accordingly, I am of the view there is a broader public interest in members of the public being able to voluntarily provide their personal affairs information and make complaints to the Agency

⁸ *AB v Department of Education and Early Childhood Development* [2011] VCAT 1263 at [58].

⁹ *Victoria Police v Marke* [2008] VSCA 218 at [104].

on a confidential basis which facilitates the Agency being able to carry out its regulatory and enforcement functions efficiently and effectively.

On balance, I consider this broader public interest outweighs the Applicant's personal interest in the information. I am also not satisfied any public interest would be promoted by the disclosure of an Agency officer's personal affairs information in the particular documents.

(e) 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.¹⁰

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 privacy of the relevant third parties.

While there is no information before me to suggest the information will be widely disseminated by the Applicant, I consider it is reasonably likely the personal privacy of the third party complainants will be impacted should their personal affairs information be disclosed.

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

In deciding 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.¹¹ However, this obligation does not arise in certain circumstances, including if it is not practicable to do so.¹²

While the Agency did not undertake consultation with the third parties, as required under section 33(2B), I am satisfied based on the information provided by the Agency that the third parties would object to disclosure of their personal affairs information.

(g) 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.¹³ There is no information before me to indicate this is a relevant factor.

21. In weighing up the above factors, on balance, I am satisfied it would be unreasonable to disclose certain personal affairs information of third parties in the documents. In particular, I consider there is a broader public interest in individuals being able to voluntarily provide their personal affairs information to the Agency on a confidential basis which ensures the Agency is able to carry out its regulatory and enforcement functions. Accordingly, I am satisfied such information is exempt under section 33(1).

¹⁰ *Victoria Police v Marke* [2008] VSCA 218 at [68].

¹¹ Section 33(2B).

¹² Section 33(2C).

¹³ Section 33(2A).

22. However, I am not satisfied it would be unreasonable to release the names and position titles of Agency officers who were directly involved or had responsibility for the handling of the complaints and any enforcement action taken. I consider this information reveals details of Agency officers merely performing their professional duties or responsibilities as public sector employees and does not relate to matters concerning their personal or private life. However, I have determined it would be unreasonable to release their telephone numbers and email addresses as this information is not generally available to the public. Nor do I consider any public interest would be promoted by its release in this case.
23. My decision in relation to section 33(1) is set out in the Schedule of Documents at **Annexure 1**.

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

24. The Agency did not claim section 35(1)(b); however, as detailed in paragraph 9 in conducting my review under section 49F, I make a new or ‘fresh decision’ and must ensure all relevant exemptions are considered.
25. 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; 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?

26. Whether information communicated by an individual to an agency was communicated in confidence is a question of fact.¹⁴
27. 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.¹⁵
28. Having considered the content and context of the documents, I am satisfied the third parties who communicated information to the Agency did so in a voluntary basis where confidentiality could be expressly implied.

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

29. 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.
30. 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 of an agency’s impairment goes no further than showing potential communicators of the information may be less candid than they would otherwise have been.¹⁶
31. I accept the Agency relies on information provided by third parties on a voluntary or unsolicited basis, often in the form of complaints or confidential disclosure, to carry out its regulatory and

¹⁴ *Ryder v Booth* [1985] VR 869 at [883]; *XYZ v Victoria Police* [2010] VCAT 255 at [264].

¹⁵ *XYZ v Victoria Police* [2010] VCAT 255 at [265].

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

enforcement functions. Such information provided to the Agency will by its very nature, be sensitive, confidential and on a voluntary basis.

32. I acknowledge the Applicant's interest in obtaining access to the information, noted in my consideration of section 33(1) above. However, I consider the need to protect the ability of the Agency to receive information that assists the administration and investigation of complaints made in relation to non-compliance and regulation is an essential public interest that limits disclosure of information under the FOI Act.
33. In the context of the Agency regulatory functions, I consider if all details of complaints were to be routinely released under the FOI Act, individuals would be deterred from providing similar information to the Agency in the future. Such an outcome would be detrimental to the Agency and compromise its ability to carry out its important regulatory and enforcement functions.
34. Accordingly, I am satisfied disclosure of the confidential information provided by the complainant to the Agency would be reasonably likely to impair the Agency's ability to obtain similar information in the future and the confidential information is exempt from release under section 35(1)(b).
35. The Schedule of Documents in **Annexure 1** details my decision in relation to the application of section 35(1)(b) to information in certain documents.

Section 25 – Deletion of exempt or irrelevant information

36. 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.
37. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'¹⁷ 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 25.¹⁸
38. I have considered the effect of deleting exempt and irrelevant information from the documents. In my view, it is practicable for the Agency to delete certain exempt and irrelevant information, because it would not require substantial time and effort, and the edited documents would retain meaning.

Conclusion

39. On the information before me, I am satisfied certain information in the documents is exempt from release under sections 33(1) and 35(1)(b).
40. Where it is practicable to provide the Applicant with an edited copy of the relevant document with exempt information deleted in accordance with section 25, access is granted in part.
41. The Schedule of Documents in **Annexure 1** sets out my decision in relation to each document.
42. A marked-up copy of the documents indicating exempt and irrelevant information in accordance with my decision has been provided to the Agency.

¹⁷ *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].

¹⁸ *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].

Review rights

43. 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.¹⁹
44. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.²⁰
45. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.²¹
46. 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.
47. 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.²²

Third party review rights

48. As I have determined to release documents that contain the personal affairs information of persons other than the Applicant, if practicable, I am required to notify those persons of their right to seek review by VCAT of my decision within 60 days from the date they are given notice.²³
49. In this case, I am satisfied it is practicable to notify the relevant third parties, being Agency officers, of their review rights. I have sought assistance from the Agency to notify these relevant third parties of my decision and their resultant review rights.

When this decision takes effect

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

¹⁹ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

²⁰ Section 52(5).

²¹ Section 52(9).

²² Sections 50(3F) and 50(3FA).

²³ Sections 49P(5) and 50(3).

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description as per Agency Decision	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
1.	[date]	Email from [address]– [type of complaint]	3	Refused in full Section 33(1)	Refuse in full Sections 33(1), 35(1)(b), 25	<p>Section 33(1): The document contains the personal affairs information of persons other than the Applicant, including names, contact information and information from which a person’s identity, address or location can reasonably be determined. I am satisfied the disclosure of this personal affairs information would be unreasonable for the reasons outlined above.</p> <p>Section 35(1)(b): I am satisfied the document contains information that is exempt from release under section 35(1)(b) for the reasons outlined above.</p> <p>Section 25: I am not satisfied it is practicable to provide the Applicant with an edited copy of the document with exempt information deleted in accordance with section 25 because to do so would render the document meaningless.</p>
2.	[date]	Email Further Information from	4	Refused in full Section 33(1)	Release in part Sections 33(1), 35(1)(b), 25	Sections 33(1) and 35(1)(b): See comment for Document 1.

Document No.	Date of Document	Document Description as per Agency Decision	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
		[address] – [type of complaint]			The document is to be released in accordance with the marked-up copy provided to the Agency.	Section 25: I am satisfied it is practicable to provide the Applicant with an edited copy of the document with exempt information deleted in accordance with section 25.
3.	[date]	Enquiry Trace Form – [type of complaint]	1	Refused in full Section 33(1)	Release in part Sections 33(1), 35(1)(b), 25 The document is to be released in accordance with the marked-up copy provided to the Agency.	Sections 33(1): The document contains the personal affairs information of persons other than the Applicant. I am satisfied the disclosure of certain personal affairs information relating to non-Agency officers would be unreasonable for the reasons outlined above. However, I am not satisfied it would be unreasonable to release the names and/or position titles of Agency officers who were involved or had responsibility for complaint handling and/or any relevant actions taken. I consider this information reveals details of Agency officers merely performing their professional duties or responsibilities as public sector employees and is not exempt under section 33(1). Section 35(1)(b): See comments for Document 1.

Document No.	Date of Document	Document Description as per Agency Decision	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
						Section 25: 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.
4.	[date]	Email regarding [type of complaint][address]	3	Released in full	Not subject to review	
5.	[date]	Follow up email – no action taken by Council	4	Released in full	Not subject to review	
6.	[date]	Response by [address]	2	Refused in full Section 33(1)	Release in full	Section 33(1): While I consider the document contains the personal affairs information of persons other than the Applicant, I note the Applicant is listed as a recipient of this email and the document is therefore not exempt under section 33(1).
7.	[date]	Response from Council to [address] regarding [type of complaint]	1	Released in full	Not subject to review	
8.	[date]	Email from [address] regarding [type of complaint] [address]	2	Refused in full Section 33(1)	Refuse in full Section 33(1)	Sections 33(1) and 25: See comments for Document 1.

Document No.	Date of Document	Document Description as per Agency Decision	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
9.	[date]	Email from [address] – [type of complaint]	2	Refused in full Section 33(1)	Refuse in full Sections 33(1), 35(1)(b), 25	Sections 33(1), 35(1)(b) and 25: See comments for Document 1.
10.	[date]	Response from Council to [address] [type of complaint]	1	Released in full	Not subject to review	
11.	[date]	Email from [address] [type of complaint]	1	Released in full	Not subject to review	
12.	[date]	Email from [address]	7	Released in full	Not subject to review	
13.	[date]	Email from [address] regarding [type of complaint]	6	Released in full	Not subject to review	
14.	[date]	Email from [address] regarding [type of complaint]	8	Released in full	Not subject to review	
15.	[date]	Email from [address] regarding [type of complaint]	15	Released in full	Not subject to review	
16.	[date]	Email from [address] to CEO regarding [type of complaint]	14	Released in full	Not subject to review	

Document No.	Date of Document	Document Description as per Agency Decision	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
17.	[date]	Email from [address] attaching [type of complaint]	6	Released in full	Not subject to review	
18.	[date]	Email from [address] regarding Action Plan	2	Released in full	Not subject to review	
19.	[date]	Email Response Council regarding [type of complaint]	2	Refused in full Section 33(1)	Release in part Sections 33(1), 25 The document is to be released in accordance with the marked-up copy provided to the Agency.	The attachments referenced in this document are captured in Documents 16 and 17. Sections 33(1): See comments for Document 3. Section 25: See comments for Document 2.
20.	[date]	Alleged [type of] Complaint	4	Refused in full Section 33(1)	Release in part Sections 33(1), 25 The document is to be released in accordance with the marked-up copy provided to the Agency.	Sections 33(1): The document contains the personal affairs information of persons other than the Applicant. I am satisfied the disclosure of personal affairs information relating to non-Agency officers, as well as any direct Agency contact telephone numbers, would be unreasonable for the reasons outlined above. Section 25: See comments for Document 2.

Document No.	Date of Document	Document Description as per Agency Decision	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
21.	[date]	[Type] Complaint – [Type of] Log	3	Refused in full Section 33(1)	Release in part Sections 33(1), 25 The document is to be released in accordance with the marked-up copy provided to the Agency.	The attached letter referenced in this document is Document 20. Sections 33(1): See comments for Document 3. Section 25: See comments for Document 2.
22.	[date]	Email regarding [type of complaint]	2	Refused in full Section 33(1)	Refuse in full Sections 33(1), 35(1)(b), 25	Sections 33(1), 35(1)(b) and 25: See comments for Document 1.
23.	[date]	FOI Application	2	Released in full	Not subject to review	
24.	[date]	Enquiry Trace Form – [Description of] Levels from [type of complaint]	1	Refused in full Section 33(1)	Release in part Sections 33(1), 35(1)(b), 25 The document is to be released in accordance with the marked-up copy provided to the Agency.	This document is a duplicate of Document 3. Sections 33(1), 35(1)(b) and 25: See comments for Document 3.
25.	[date]	Enquiry Trace Form – Follow Up of [type of complaint]	1	Refused in full Section 33(1)	Release in part Sections 33(1), 35(1)(b), 25 The document is to be released in accordance	Sections 33(1) and 25: See comments for Document 3. Section 35(1)(b): See comments for Document 1.

Document No.	Date of Document	Document Description as per Agency Decision	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
					with the marked-up copy provided to the Agency.	