

## Notice of Decision and Reasons for Decision

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Applicant:	'EZ5'
Agency:	Kingston City Council
Decision date:	10 February 2023
Exemption and provision considered:	Sections 33(1), 25
Citation:	'EZ5' and Kingston City Council (Freedom of Information) [2023] VICmr 5 (10 February 2023)

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FREEDOM OF INFORMATION – council documents – correspondence – [item] removal – third party property owner – personal affairs information – local government regulatory information – disclosure of regulatory information not unreasonable – disclosure of personal affairs information unreasonable

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 documents requested by the Applicant under the FOI Act.

My decision on the Applicant's request differs from the Agency's decision.

While I am satisfied certain information is exempt from release under section 33(1), I am not satisfied other information to which the Agency refused access under sections 33(1) and 35(1)(a) is exempt from release.

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

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

My reasons for decision follow.

**Joanne Kummrow**  
Public Access Deputy Commissioner

10 February 2023

## Reasons for Decision

### Background to review

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

A copy of a document sent to the owner of [Address] about the removal of an [item] from that property without a permit. The document should state that the owner will be fined; and

A copy of a database entry in either TRIM, or another record management system, recording that the applicant was sent the notice; and

A document in a database, either TRIM or another record management system, recording that a fine had been paid in relation to removing the [item] without a permit.

2. The Agency identified three documents falling within the terms of the Applicant's request and refused access to the documents in full under sections 33(1) and 35(1)(a). The Agency's decision letter sets out the reasons for its decision.

### Complaint concerning the handling of the FOI request

3. During the review, the Applicant raised concerns about the adequacy of the Agency's document searches in relation to their FOI request.
4. In accordance with section 61B(3), these concerns were addressed as part of this review.
5. The Applicant complained that the Agency's clarification sought about the Applicant's request was unnecessary. Following consideration of the Applicant's original FOI request, and the Agency's submission, including a timeline of events, I am satisfied the Agency appropriately sought further information from the Applicant regarding the nature of their request.
6. OVIC staff made further enquiries with the Agency to address the Applicant's concerns. The outcome of those enquiries was communicated to the Applicant.
7. Based on the Agency's responses, I am satisfied it undertook a thorough and diligent search for the requested documents. Accordingly, I consider the Applicant's complaint has been fully pursued and there is no need to make further enquiries or take further action under the FOI Act in relation to those particular concerns.

### Review application

8. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
9. In their application for review, the Applicant advised they do not seek access to third parties' personal affairs information. However, it is necessary to consider the scope of personal affairs information broadly as it includes not only the names and locations of third parties, but also other information from which one or more third parties may be identified.
10. Therefore, I consider the following information is not sought by the Applicant and is irrelevant information for the purpose of section 25, which is discussed below:
  - (a) the names, addresses, email addresses and telephone numbers of third parties; and
  - (b) names, telephone numbers, position titles, email addresses and signatures of Agency officers.

11. The remainder of the personal affairs information in the documents, including information regarding the [property identified in the Applicant's request], is subject to review.
12. During the review, the Agency advised it no longer relies on the exemption under section 35(1)(a) in relation to Documents 2 and 3.
13. I have examined a copy of the documents subject to review.
14. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
15. I have considered all communications and submissions received from the parties.
16. 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.
17. 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 33(1) – Documents affecting personal privacy of third parties***

18. 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 (**third party**);<sup>1</sup> and
  - (b) such disclosure would be 'unreasonable'.

#### *Do the documents contain personal affairs information of individuals other than the Applicant?*

19. 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 this may be reasonably determined.<sup>2</sup>
20. 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.<sup>3</sup>
21. As described above, while the Applicant states they are not seeking personal affairs information, it is clear from their request that they are seeking access to certain personal affairs information. This includes correspondence with a third party as well as certain agency records about that third party.

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<sup>1</sup> Sections 33(1) and 33(2).

<sup>2</sup> Section 33(9).

<sup>3</sup> *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].

*Would disclosure of the third party personal affairs information be unreasonable?*

22. 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.
23. In *Victoria Police v Marke*,<sup>4</sup> 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'.<sup>5</sup> 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'.<sup>6</sup>
24. In determining whether disclosure of the third party personal affairs information would be unreasonable in the circumstances, I have considered the following factors:
  - (a) the nature of the personal affairs information;
  - (b) the circumstances in which the information was obtained;
  - (c) the applicant's interest in the information and whether their purpose for seeking the information is likely to be achieved;
  - (d) whether any public interest would be promoted by release of the personal affairs information;
  - (e) whether the individuals to whom the information relates object, or would be likely to object, to the release of the information;<sup>7</sup> and
  - (f) whether disclosure of the information would or would be reasonably likely to endanger the life or physical safety of any person.<sup>8</sup>
25. I have considered the following in relation to whether disclosure of the personal affairs information in this case would be unreasonable:
  - (a) the genuine attempts by the Agency to provide the information sought by the Applicant outside the FOI Act, including information about the compliance action taken by the Agency and the third party's response;
  - (b) that, in doing so, much of the information in the documents is known to the Applicant and therefore its disclosure would provide little additional information to the Applicant;
  - (c) the documents do not relate to particularly sensitive or personal matters;
  - (d) a third party objects to disclosure of their personal affairs information under the FOI Act;
  - (e) in relation to such matters, that at least some members of the community would likely share the view that such documents should remain confidential between the Agency and a third party;

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<sup>4</sup> [2008] VSCA 218 at [76].

<sup>5</sup> *Ibid.*

<sup>6</sup> *Ibid* at [79].

<sup>7</sup> Section 33(2B).

<sup>8</sup> This is a mandatory consideration under section 33(2A).

- (f) conversely, there is a public interest in disclosure of documents that demonstrate an agency with law enforcement functions is meeting its statutory obligations;
  - (g) I consider disclosure of certain information would provide the Applicant with the information they are seeking;
  - (h) I do not consider disclosure the relevant information would endanger the life or physical safety of any person;
  - (i) when considering whether disclosure would be unreasonable, I do not consider whether certain classes of documents are exempt under section 33(1), rather I must consider the contents of the particular documents subject to review; and
  - (j) that the applicant is not seeking the name and addresses of third parties and that this information may be deleted from the documents.
26. Having weighed the above factors and in the specific circumstances of this matter, I am satisfied the disclosure of certain personal affairs information to the Applicant would not be unreasonable.
27. In doing so, I have considered foremost that the specific documents before me do not reveal any further substantive information not already known by the Applicant, neither are they particularly sensitive nor personal in nature.
28. Accordingly, I am satisfied certain personal affairs information in the documents is exempt from release under section 33(1).

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

29. 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.
30. Determining what is ‘practicable’ requires consideration of the effort and editing involved in making the deletions ‘from a resources point of view’<sup>9</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>10</sup>
31. The Agency decided the attachments to Document 3 fall outside the terms of the Applicant’s request. Having reviewed the documents, I am satisfied they fall outside the scope of the request and are therefore irrelevant for the purposes of section 25.
32. I have considered the effect of deleting exempt and irrelevant information from the documents. I am satisfied it is practicable to delete such information as to do so would not require substantial time and effort, and the edited documents would retain meaning.

#### **Conclusion**

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

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<sup>9</sup> *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].

<sup>10</sup> *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].

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

### **Review rights**

36. 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>11</sup>

37. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.<sup>12</sup>

38. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.<sup>13</sup>

39. 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.

40. 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>14</sup>

### **Third party review rights**

41. 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.<sup>15</sup>

42. In this case, I am satisfied it is practicable to notify the relevant third parties of their review rights and confirm they will be notified of my decision on the date of decision.

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

43. My decision does not take effect until the third parties' 60 day review period expires.

44. If a review application is made to VCAT, my decision will be subject to any VCAT determination.

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<sup>11</sup> The Applicant in section 50(1)(b) and the Agency in section 50(3D).

<sup>12</sup> Section 52(5).

<sup>13</sup> Section 52(9).

<sup>14</sup> Sections 50(3F) and 50(3FA).

<sup>15</sup> Sections 49P(5), 50(3).

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
1.	[Date]	[name of document]	1	Refused in full Section 33(1)	Release in part Section 25 The document is to be released with irrelevant information deleted under section 25.	<p><b>Section 33(1):</b> I am satisfied it would not be unreasonable to disclose the personal affairs information of the third party for the reasons outlined in the Notice of Decision above.</p> <p><b>Section 25:</b> The Applicant does not seek access to certain personal affairs information, being:</p> <ul style="list-style-type: none"> <li>• the name and address that appears at the top of the document; and</li> <li>• the name, position title and signature of the agency officer.</li> </ul> <p>Therefore, this information is irrelevant to the Applicant's request and I am satisfied it is practicable to delete it from the document in accordance with section 25.</p>
2.	[Date]	[name of document]	2	Refused in full Sections 33(1), 35(1)(a)	Release in part Section 25 The document is to be released with irrelevant information deleted under section 25.	<p><b>Section 33(1):</b> See comments for Document 1.</p> <p><b>Section 35(1)(a):</b> The Agency advised it no longer relies on the exemption under section 35(1)(a) to refuse access to this document.</p> <p><b>Section 25:</b> As the Applicant is not seeking certain personal affairs information, the following is irrelevant information:</p>

Document No.	Date of Document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
						<ul style="list-style-type: none"> <li>all names, addresses and telephone numbers.</li> </ul> <p>I note the deletion of irrelevant information will leave minimal information in the document. However, as the Applicant specifically seeks access to this document, I consider it would be reasonable and practicable to release the document to them in this form.</p>
3.	[Date]	[name of document]	2	Refused in full Sections 33(1), 35(1)(a)	Release in part Section 25 The document is to be released with irrelevant information deleted under section 25.	<p><b>Section 33(1):</b> See comments for Document 1.</p> <p><b>Section 35(1)(a):</b> See comments for Document 2.</p> <p><b>Section 25:</b> As the Applicant is not seeking certain personal affairs information, the following is irrelevant information:</p> <ul style="list-style-type: none"> <li>all names, addresses and telephone numbers.</li> </ul> <p>See also comments for Document 1.</p>