

Notice of Decision and Reasons for Decision

Applicant:	'EJ6'
Agency:	Victorian Building Authority
Decision date:	19 April 2022
Exemptions considered:	Section 30(1), 31(1)(d), 33(1)
Citation:	'EJ6' and Victorian Building Authority (<i>Freedom of Information</i>) [2022] VICmr 115 (19 April 2022)

FREEDOM OF INFORMATION – regulatory documents – building regulator – Victorian Statewide Cladding Audit – audit report – risk assessment – internal working document – public interest considerations – 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 to documents requested by the Applicant under the FOI Act.

My review decision differs from that of the Agency in that I have determined to release additional information in the documents where I am satisfied it is not exempt from release.

I am satisfied certain information in the documents is exempt under sections 30(1) and 31(1)(d).

As I am satisfied it is practicable to provide the Applicant with an edited copy of the documents with irrelevant and exempt information deleted in accordance with section 25, access to 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
19 April 2022

Reasons for Decision

Background to review

1. [Background information redacted].
2. The Applicant made a request to the Agency seeking access to:

All documents relating to the property at [Property address] between [month] [year] and today's date including but not limited to:

 - a. Any correspondence from the [another Agency] in relation to the cladding at the Property;
 - b. Any Emergency Orders issued by the [another Agency];
 - c. Any Building Notices issued by the [another Agency];
 - d. Any Building Notices issued by the VBA;
 - e. Any documents of the VBA in relation to the cladding at the Property;
 - f. Any documents produced by [Name] in relation to [their] inspection of the Property on [date];
 - g. Any Building Orders issued by the VBA;
 - h. Any report produced by the VBA in relation to the Property; and
 - i. Any documents produced by Cladding Safety Victoria.
3. In its decision, the Agency interpreted the scope of the Applicant's request as:

In respect to the property [Property address and plan number]. We request all documentation held by the VBA in relation to:

 - a) The inspection on [date];
 - b) The Building Order and Building Notice referenced above; and
 - c) Any correspondence in relation to the Property in [year].
4. The Agency identified 48 documents falling within the terms of the Applicant's request and granted access to eight documents in full, and refused access to 39 documents in part and one document in full under sections 30(1), 31(1)(d) and 33(1). The Agency's decision letter sets out the reasons for its decision.

Review application

5. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
6. The Applicant seeks review of Documents 24 and 36 only and does not seek review of information exempted from release by the Agency under section 33(1). Accordingly, the scope of my review is narrowed to Documents 24 and 36.
7. I have examined copy of the two documents subject to review.
8. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
9. I have considered all communications and submissions received from the parties.
10. 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.

11. 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.

Complaint concerning adequacy of Agency document searches

12. During the review, the Applicant raised concerns about the adequacy of the Agency's document searches. In accordance with section 61B(3), these concerns were addressed as part of this review.
13. OVIC staff made further enquires with the Agency in relation to the Applicant's concerns. The outcome of those enquires was communicated to the Applicant and I am satisfied the Agency has identified the relevant documents that fall within the scope of the Applicant's request as interpreted by the Agency.

Review of exemptions

Section 30(1) – Internal working documents

14. Section 30(1) has three requirements:
 - (a) the document must disclose matter in 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 function of an agency or Minister of the government; and
 - (c) disclosure of the matter would be contrary to the public interest.
15. The exemption does not apply to purely factual material in a document.¹
16. Document 24 is a timeline of events in relation to a residential building. Specifically, the information exempted from release by the Agency in this document contains various risk ratings.
17. Document 36 is a Victorian Statewide Cladding Audit Report and contains the history and enforcement of safety protocols and an assessment of fire resistant levels and general issues relating to the building.
18. Both documents are used for the purpose of identifying and establishing fire risk in relation to any cladding material used in the construction of the building.

¹ Section 30(3).

Were the documents prepared by an officer of the Agency?

19. The term 'officer of an Agency' is defined in section 5(1). It includes a member of an agency, a member of an agency's staff, and any person engaged by or on behalf of an agency, whether or not they are subject to the *Public Administration Act 2004* (Vic).
20. Having reviewed the documents, I am satisfied they were prepared by an officer of the Agency for the purpose of section 30(1).

Do the documents contain information in the nature of opinion, advice recommendation, consultation or deliberation?

21. For the requirements of section 30(1) to be met, a document must contain matter in the nature of opinion, advice or recommendation prepared by an officer of an agency, or consultation or deliberation between officers.
22. It is not necessary for a document to be in the nature of opinion, advice or recommendation. Rather, it is required that release of the document would disclose matter of that nature.²
23. Section 30(3) provides purely factual information will not be exempt under section 30(1).
24. Document 36 contains certain information that is purely factual in nature, such as background and historical information in relation to the building.
25. In contrast, Document 24 and parts of Document 36 contain risk assessments concerning the building, which I am satisfied constitutes information in the nature of opinion and advice regarding the safety of the building.
26. Accordingly, while I am satisfied Documents 24 and 36 contain information in the nature of opinion and advice, I have determined certain information in Document 36 is purely factual in nature and does not satisfy the first limb of section 30(1).

Were the documents 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?

27. The term 'deliberative process' is interpreted widely and includes any of the processes of deliberation or consideration involved in the functions of an agency, Minister or government.³
28. In *Re Waterford and Department of Treasury (No. 2)*,⁴ 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.

29. Having considered the documents under review, I accept they were prepared in the course of the Agency's deliberative processes with respect to undertaking an assessment of the building and any cladding safety issues in accordance with its regulatory functions.

² *Mildenhall v Department of Education* (1998) 14 VAR 87.

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

⁴ [1984] AATA 67; (1984) 5 ALD 588; 1 AAR 1 at [58].

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

30. I must also be satisfied disclosure of the documents would not be contrary to the public interest, which requires a 'process of the weighing against each other conflicting merits and demerits'.⁵
31. In doing so, I must consider all relevant facts and circumstances remaining mindful the objective of the FOI Act is to facilitate and promote the disclosure of information, limited only by exemptions that protect essential public interests.
32. In determining whether disclosure of the documents would be contrary to the public interest, I have taken the following factors into consideration:⁶
- (a) the right of every person to gain access to documents under the FOI Act;
 - (b) the degree of sensitivity of the issues discussed in the documents and the broader context giving rise to the creation of the documents;
 - (c) the stage of a decision or status of policy development or a process being undertaken at the time the communications were made;
 - (d) whether disclosure of the documents would be likely to inhibit communications between Agency officers, essential for the Agency to make an informed and well-considered decision or participate fully and properly in a process in accordance with the Agency's functions and other statutory obligations;
 - (e) whether disclosure of the documents would give merely a part explanation, rather than a complete explanation for the making of a particular decision or the outcome of a process, which the Agency would not otherwise be able to explain upon disclosure of the documents;
 - (f) the impact of disclosing documents in draft form, including disclosure not clearly or accurately representing a final position or decision reached by the Agency at the conclusion of a decision or process; and
 - (g) the public interest in the community being better informed about the way in which the Agency carries out its functions, including its deliberative, consultative and decision making processes and whether the underlying issues require greater public scrutiny.
33. The Applicant submits:

In *Secretary to the Department of Justice v Osland*,⁷ the Court considered that the public interest considerations underlying the public interest included "the efficient and economical conduct of government, protection of the deliberative processes of government, particularly at high levels of government and in relation to sensitive issues, in the preservation of confidentiality so as to promote the giving of full and frank advice."

It has been found that the public interest is a matter in which the public at large has an interest as opposed to the matter only impacting the interests of a particular individual.

The VBA has the power to inspect a property and have orders issued in its name against building owners to undertake certain works at a property.

⁵ *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].

⁶ *Hulls v Victorian Casino and Gambling Authority* (1998) 12 VAR 483.

⁷ (2007) 26 VAR 425.

In relation to cladding issues, the VBA, under the Victorian Statewide Cladding Audit, can attend a property and direct certain works to be undertaken.

In issuing a building order and building notice, the VBA has significant power in directing works to be undertaken. It is clear that the documents that relate to how that power is wielded is in the public interest to all persons potentially impacted by a decision by the VBA, either now or in the future.

In this matter, [the Applicant] was [description of connection to the] Property. [Redacted background information].

[Redacted]

As the Owners Corporation removed the cladding based on the building orders issued on behalf of the VBA, [the Applicant] is entitled to view all documentation relevant to how the order came to be made.

[Redacted]

34. [Redacted background information].
35. I have considered the following factors in determining whether disclosure of the documents would be contrary to the public interest:
- (a) the documents concern a sensitive matter, being Agency documentation regarding its inspection of cladding safety issues at a residential building in accordance with its statutory responsibilities under the *Building Act 1993* (Vic) and associated Building Regulations; and
 - (b) the FOI Act does not place any restrictions on an applicant's use or dissemination of documents obtained under FOI. Therefore, broader disclosure of the documents, which contain specific details relevant to any risks associated with combustible cladding used at the building, may allow a person to identify or target the building and pose a risk to public safety.
36. I have considered the public interest in relation to the community being informed about the way in which an agency carries out its functions, including whether the Agency's decision making should be subject to public scrutiny in the circumstances of this matter. However, for the reasons set out above and based on the information before me, I consider disclosure of the following information in the documents in relation to the building would be contrary to the public interest:
- (a) fire risk ratings and assessments;
 - (b) the issues register, containing fire hazard and safety resistance levels; and
 - (c) the location and risk assessment of cladding used.
37. Accordingly, I am satisfied certain information in the documents is exempt under section 30(1).
38. My decision on section 30(1) is outlined in the Schedule of Documents in **Annexure 1**.

Section 31(1)(d) – Disclosure would disclose methods or procedures for preventing, detecting, investigating breaches of the law

39. Section 31(1)(d) provides a document is exempt if its disclosure 'would, or would be reasonably likely to disclose methods or procedures for preventing, detecting, investigating, or dealing with matters arising out of, breaches or evasions of the law disclosure of which would, or would be reasonably likely to, prejudice the effectiveness of those methods or procedures'.
40. The various exemptions under section 31(1) do not apply to widespread and well-known methods and procedures.⁸

⁸ *XYZ v Victoria Police* [2010] VCAT 255 at [177].

41. 'Reasonably likely' means there is a real chance of an event occurring; it is not fanciful or remote.⁹
42. 'Prejudice' means to hinder, impair or undermine and includes actual prejudice as well as impeding prejudice.¹⁰
43. 'In a particular instance' does not require a single specific investigation and can encompass specific, identified aspects of law, administration of law or investigations of breaches or potential breaches of law.¹¹
44. In this instance, the documents relate to an investigation of cladding safety issues at a residential building. As stated above, I am satisfied the documents relate to the Agency's statutory functions under the *Building Act 1993* (Vic) and associated Building Regulations.
45. I note disclosure of information under the FOI Act is unconditional and unrestricted. I consider if information confirming the location, risk rating and any vulnerabilities of a building in relation to fire safety were to be released on an unrestricted basis, it could allow individuals to identify and exploit the vulnerabilities at the building, with the potential to cause damage to the building or harm to individuals.
46. I accept that if such information was routinely disclosed under the FOI Act the future reporting of defective building works may be impaired. I am satisfied this would have a detrimental impact on the Agency's ability to carry out its important regulatory and enforcement functions in relation to building safety and registered building practitioners.
47. The disclosure of this information would also prejudice the effectiveness of the Agency's methods and procedures used in ensuring the most appropriate safety measures are investigated, established and implemented.
48. Having reviewed the documents, I am satisfied the information is not widespread or well known by the public. Having considered the likely effect of its disclosure under the FOI Act, I am satisfied it would be reasonably likely to undermine the Agency's use and effectiveness of its methods and procedures in carrying out building investigations and regulatory functions.
49. Section 31(2) sets out six circumstances where section 31(1) does not apply where there is a public interest in granting access to a document. Specifically, I have considered the exception under section 31(2)(e), which requires consideration of whether it would be in the public interest to grant access to a report prepared in the course of an investigation by an agency which has the function of enforcing and regulating compliance with a particular law other than the criminal law.¹² However, even if the exception in section 31(2)(e) is made out, the public interest test must still be established.¹³ For the reasons set out above, I am satisfied disclosure of the documents would not be in the public interest and the exception in section 31(2)(e) does not apply.
50. Accordingly, I am satisfied certain information in the documents is exempt from release under section 31(1)(d).
51. My decision on section 31(1)(d) is outlined in the Schedule of Documents in **Annexure 1**.

Section 25 – Deletion of exempt or irrelevant information

⁹ *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.

¹⁰ *Ibid*, Bergman at [66], referring to *Sobh v Police Force of Victoria* [1994] VicRp 2; [1994] 1 VR 41 at [55].

¹¹ *Cichello v Department of Justice (Review and Regulation)* [2014] VCAT 340 at [24].

¹² Section 31(2)(e).

¹³ *Fogarty v Office of Corrections* (1989) 3 VAR 214 at [88].

52. 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.
53. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'¹⁴ 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 25.¹⁵
54. As the Applicant does not seek review of information exempted from release by the Agency under section 33(1), this information is irrelevant information for the purposes of section 25 and is to remain deleted.
55. I have considered the effect of deleting exempt and irrelevant information from the documents in accordance with section 25. I am satisfied it is practicable to do so, as editing of the documents would not require substantial time and effort, and the edited documents would retain meaning.

Conclusion

56. On the information before me, I am satisfied certain information in the documents is exempt under sections 30(1) and 31(1)(d). However, I have determined to release a small amount of additional information in Document 36 which I am satisfied is factual in nature and not exempt from release.
57. As I am satisfied it is practicable to provide the Applicant with an edited copy of the documents with irrelevant and exempt information deleted in accordance with section 25, access to documents is granted in part.
58. The Schedule of Documents in **Annexure 1** sets out my decision in relation to each document.

Review rights

59. If either party to this review is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.¹⁶
60. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹⁷
61. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹⁸
62. 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.
63. 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.¹⁹

When this decision takes effect

¹⁴ *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].

¹⁵ *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].

¹⁶ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

¹⁷ Section 52(5).

¹⁸ Section 52(9).

¹⁹ Sections 50(3F) and 50(3FA).

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

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
24.	Undated	Timeline of the events	10	Released in part Sections 30(1), 31(1)(d), 33(1)	Release in part Sections 30(1), 31(1)(d), 25 This document is to be released, except for the following information which is to be deleted in accordance with section 25: (a) information the Agency exempted from release under section 33(1), which is irrelevant information; and (b) information the Agency exempted from release under sections 30(1) and 31(1)(d), which I am satisfied is exempt.	<p>Section 30(1): I am satisfied it would be contrary to the public interest to disclose the information the Agency exempted from release under section 30(1) for reasons set out in the Notice of Decision above.</p> <p>Section 31(1)(d): I am satisfied the document discloses a method for preventing, detecting or investigating, breaches or evasions of the law, the disclosure of which would be reasonably likely to prejudice the effectiveness of those methods or procedures. Accordingly, I am satisfied the relevant information is exempt from release under section 31(1)(d).</p> <p>Section 25: The Applicant does not seek review of information exempted from release by the Agency under section 33(1). Accordingly, this information is irrelevant for the purposes of this review and is to be remain deleted in accordance with section 25.</p> <p>I am satisfied it is practicable to provide the Applicant with an edited copy of this document with exempt and irrelevant information deleted in</p>

Document No.	Date of Document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
						accordance with section 25.
36.	[Date]	VBA Panel Brief	8	<p>Refused in full</p> <p>Sections 30(1), 31(1)(d), 33(1)</p>	<p>Released in part</p> <p>Sections 30(1), 30(1)(d), 25</p> <p>The document is to be released except for the following information which is to be deleted in accordance with section 25:</p> <p>(a) the information exempted from release by the Agency under section 33(1) on page 133; and</p> <p>(b) pages 137 to 140 in full.</p>	<p>Section 30(1): I am satisfied certain information is not exempt from release under section 30(1) as it is purely factual in nature. However, I am satisfied disclosure of the remaining information in this document would be contrary to the public interest for the reasons set out in the Notice of Decision above.</p> <p>Section 31(1)(d): See comments for Document 24.</p> <p>Section 25: See comments for Document 24.</p>