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Notice of Decision and Reasons for Decision

Applicant:	'FB7'
Agency:	Moonee Valley City Council
Decision date:	5 April 2023
Exemptions and provision considered:	Sections 30(1), 32(1), 33(1), 34(1)(b), 25
Citation:	'FB4' and Moonee Valley City Council (Freedom of Information) [2023] VICmr 21 (5 April 2023)

FREEDOM OF INFORMATION – local government – regulatory role and powers – planning permit – noise complaint – infringement notice – internal appeal process – third party personal affairs information – internal working documents – correspondence between agency officers

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.

I am satisfied certain information in the documents is exempt from release under sections 30(1), 32(1) and 33(1). However, I have determined to release additional information that I consider not exempt from release under sections 30(1), 33(1) and 34(1)(b).

Where I am satisfied it is practicable to provide the Applicant with an edited copy of a document with exempt information deleted in accordance with section 25, I have determined to grant access to certain documents in part.

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

Marked-up copies of Documents 1, 1.1, 1.3, 2, 3 and 4 have been provided to the Agency in accordance with my decision.

My reasons for decision follow.

Joanne Kummrow

Public Access Deputy Commissioner

5 April 2023

Reasons for Decision

Background to review

1. The Applicant made a noise complaint to the Agency alleging a local business (the **Business**) was operating in breach of conditions imposed on a planning permit issued by the Council. Following the complaint, the Agency issued a Planning Infringement Notice (the **PIN**) to the Business regarding alleged noise emissions from a commercial premises. The Business sought an internal review by the Agency of its original decision to issue the PIN. The outcome of the appeal process was the PIN was revoked.
2. The Applicant made a Freedom of Information request to the Agency seeking access to:

Documents held by Moonee Valley City Council in relation to Planning Infringement Notice, ref [reference number].
3. The Agency identified six documents falling within the terms of the Applicant's request and refused access to five documents in part and one document in full under sections 30(1) and 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 to the documents in full.
5. The Applicant state they seek access to the documents 'to better understand the internal review process of the Council when a decision was made to revoke a Planning Infringement Notice'. They also seek 'access to personal information relating to third parties, for the purpose of this review the personal information I am seeking is the position titles of Authorised Officers and position titles of senior executive staff within the Council'. The Applicant seeks to ensure the appeal process was not subject to any conflicts of interest.
6. During the review the Applicant narrowed the scope of their review application to certain information to which the Agency refused access under sections 33(1), 30(1) and 25, being Documents 1, 1.1, 1.2, 1.3, 2, 3, 3.2 and 4 as described in the Schedule of Documents in **Annexure 1**.
7. I have examined a copy of the 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.
12. 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'. 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.

Review of exemptions

Section 30(1) – Internal working documents

13. Section 30(1) has three requirements:
 - (a) the document must disclose matter in the 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 functions of an agency or Minister or of the government; and
 - (c) disclosure of the matter would be contrary to the public interest.
14. The exemption does not apply to purely factual material in a document.¹
15. The Agency refused access to certain information in Documents 2, 3 and 4 under section 30(1).

Where the documents prepared by an officer of the Agency?

16. 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 employed by or on behalf of an agency, regardless of whether they are subject to the *Public Administration Act 2004* (Vic).
17. From my review of the documents, I am satisfied each they were prepared by Agency officers.
18. Documents 2 and 3 are emails exchanged between Agency officers in relation to the appeal of the PIN.
19. Document 4 is a form that was used by an Agency officer to document and record their decision following an internal review of the Council’s decision to issue the PIN to the Business.

Do the documents disclose matter in the nature of opinion, advice or recommendation, or consultation or deliberation?

20. 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 agency officer, or consultation or deliberation between agency officers.
21. It is not necessary for a document to be in the nature of opinion, advice or recommendation. Rather, the issue is whether release of the document would disclose matter of that nature.²
22. From my review of the documents, I am satisfied they contain information in the nature of opinion, recommendation and deliberation relating to the Agency’s internal appeal process in respect to the issuing of the PIN.

Were the documents made in the course of, or for the purpose of, the deliberative processes involved in the functions of the agency?

23. The term ‘deliberative process’ is interpreted broadly and includes any of the processes of deliberation or consideration involved in the functions of an agency, Minister or government.³

¹ Section 30(3).

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

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

24. 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.

25. I am satisfied the documents were prepared in the course of, and for the purpose of, the Agency’s deliberative process in undertaking an internal review of the Agency’s decision to issue the PIN to the Business.

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

26. In deciding if release is contrary to the public interest, I must consider all relevant facts and circumstances remaining mindful the object of the FOI Act is to facilitate and promote the disclosure of information. In doing so, I have given weight to the following relevant factors:⁵

- (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 taking 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.

27. I accept there is a public interest in ensuring Agency officers responsible for responding to an internal review of a PIN are able to freely and appropriately discuss, deliberate and record relevant issues and information in a thorough and considered manner. This includes being able to record their internal deliberations without concern that information will be released under the FOI Act. I consider disclosure of certain information in the documents would be reasonably likely to inhibit communications between Agency officers essential for it to thoroughly and efficiently address and respond to PIN appeal matters.

28. However, I am not satisfied disclosure of all information in the documents would be contrary to the public interest where the information discloses general discussions between Agency officers relating

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

⁵ *Hulls v Victorian Casino and Gambling Authority* (1998) 12 VAR 483.

to the ordinary handling of the appeal that merely demonstrates officers carrying out their usual administrative duties and responsibilities on behalf of the Council.

29. Accordingly, I am satisfied certain information in the documents is exempt from release under section 30(1). However, I have determined additional information can be released where it is not exempt information.
30. The Schedule of Documents in **Annexure 1** sets out my decision on section 30(1).

Section 32(1) – Documents subject to legal professional privilege

31. Having reviewed the documents, it is necessary to also consider the application of section 32(1) in relation to certain information in Documents 3 and 4.
32. Section 32(1) provides a document is an exempt document ‘if it is of such a nature that it would be privileged from production in legal proceedings on the ground of legal professional privilege or client legal privilege’.

Legal professional privilege

33. A document will be subject to legal professional privilege where it contains a confidential communication between:⁶
 - (a) the client (or the client’s agent) and the client’s professional legal advisors, that was made for the dominant purpose of obtaining or providing legal advice or is referable to pending or contemplated litigation;
 - (b) the client’s professional legal advisors and third parties, that was made for the dominant purpose of pending or contemplated litigation; or
 - (c) the client (or client’s agent) and third parties that was made for the dominant purpose of obtaining information to be submitted to the client’s professional legal advisors for the dominant purpose of obtaining advice on pending or contemplated litigation.

Client legal privilege

34. A document will be subject to client legal privilege where it contains a ‘confidential communication’ between:
 - (a) the client (or the client’s agent) and the client’s professional legal advisers, that was made for the dominant purpose of obtaining or providing legal advice;⁷ or
 - (b) the client and another person, which was made for the dominant purpose of the client being provided with professional legal services relating to a proceeding in which the client is or was a party.⁸
35. For convenience, I refer to ‘legal professional privilege’ and ‘client legal privilege’ as ‘legal privilege’ in this decision.
36. The High Court of Australia has observed the importance of legal privilege:

⁶ *Graze v Commissioner of State Revenue* [2013] VCAT 869 at [29]; *Elder v Worksafe Victoria* [2011] VCAT 1029 at [22]. See also section 119 of the *Evidence Act 2008* (Vic).

⁷ Section 118 of the *Evidence Act 2008* (Vic).

⁸ Section 119 of the *Evidence Act 2008* (Vic).

The rationale of this head of privilege, according to traditional doctrine, is that it promotes the public interest because it assists and enhances the administration of justice by facilitating the representation of clients by legal advisers, the law being a complex and complicated discipline. This it does by keeping secret their communications, thereby inducing the client to retain the solicitor and seek his advice, and encouraging the client to make a full and frank disclosure of the relevant circumstances to the solicitor.⁹

37. For legal professional privilege to apply, there must be a lawyer-client relationship.¹⁰
38. The dominant purpose for which the confidential communication was made will determine whether the exemption applies.¹¹
39. Legal privilege exists to protect the confidentiality of communications between a lawyer and a client. Privilege will be lost where the client has acted in a way that is inconsistent with the maintenance of that confidentiality – for instance where the substance of the information has been disclosed with the client’s express or implied consent.¹²
40. It is clear on the face of Documents 3 and 4 that they disclose legal advice that was received by the Agency from its external lawyers in relation to the issuing of the PIN. I am also satisfied the privileged nature of this information has not been waived by the Agency in this instance. Accordingly, I am satisfied information in Document 3 and 4 is exempt from release under section 32(1).
41. The Schedule of Documents in **Annexure 1** sets out my decision on section 32(1).

Section 33(1) – Personal affairs information of a third party

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

Does the document contain personal affairs information of individuals other than the Applicant?

43. 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.¹⁴
44. A document will disclose a third party’s personal affairs information if it is capable, either directly or indirectly, of identifying that person.
45. 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.¹⁵
46. The Agency refused access to the following documents under section 33(1):
 - (a) email submitted by the Business appealing the planning infringement notice (Document 1);

⁹ *Grant v Downs* [1976] HCA 63; (1976) 135 CLR 674 at [19].

¹⁰ *Young v State Insurance Office* (1986) 1 VAR 267.

¹¹ *Eso Australia Resources Ltd v Commissioner of Taxation* (1999) 201 CLR 49.

¹² Sections 122(2) and 122(3) of the *Evidence Act 2008* (Vic) (for client legal privilege); *Mann v Carnell* (1999) 201 CLR 1 at [28] (for legal professional privilege).

¹³ Sections 33(1) and 33(2).

¹⁴ Section 33(9).

¹⁵ *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].

- (b) written appeal submission prepared by the Business (Document 1.1);
 - (c) video footage prepared by the Business (Document 1.2);
 - (d) an acoustic report prepared for the Business (Document 1.3); and
 - (e) Agency emails, including an internal review, relating to the appeal and infringement notice (Documents 2, 3 and 4).
47. The documents contain personal affairs information such as names, photographs of private property and contact details of third parties, including local council officers.
48. Document 1.2 contains video footage of a public street and location. Having viewed the footage, I am of the view it does not contain any personal affairs information. Rather it shows an empty public street with commercial premises. Accordingly, I am satisfied the video footage is not exempt from release under section 33(1).
49. Document 1.3 is an acoustic report prepared by a consultant. I agree it contains personal affairs information, namely a residential property address, names, a signature and mobile telephone number. However, I am not satisfied this information is exempt from release under section 33(1) as the majority of the information constitutes business affairs information.
50. Therefore, it is necessary to assess this information under section 34(1)(b) (see below).

Would disclosure of the personal affairs information be unreasonable?

51. The concept of 'unreasonable disclosure' involves balancing the public interest in the disclosure of official information with the interest in protecting a third party's personal privacy in the circumstances.
52. In *Victoria Police v Marke*,¹⁶ 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'.¹⁷ 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'.¹⁸
53. In determining whether disclosure of a third party's 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 Agency refused access to names, email addresses, position titles, telephone numbers and other information capable of identifying third parties.

The information was obtained by the Agency in the course of carrying out its regulatory duties, relating to an internal review of the Council's decision to issue the PIN. The information was provided to the Agency for the purpose of the Agency carrying out its review process.

¹⁶ [2008] VSCA 218 at [76].

¹⁷ *Ibid.*

¹⁸ *Ibid* at [79].

Personal affairs information of Agency officers

Generally speaking, I consider there is nothing particularly sensitive about disclosing the identity of Victorian public sector employees where their personal affairs information concerns or arises in the context of them performing their ordinary duties, is already known to the applicant or is publicly available. However, the circumstances in which the information was obtained needs to be considered, particularly where it relates to sensitive or confidential matters.

The documents record Agency officers carrying out their usual employment duties and responsibilities within a professional context, namely the handling of an infringement notice appeal. The personal affairs information does not concern those persons in their private or personal capacity. In my view, the personal affairs information of Agency officers is not particularly sensitive in the circumstances of this matter.

I am satisfied disclosure of the personal affairs of Agency officers' in this context would not be unreasonable and therefore, is not exempt from release under section 33(1).

Third party personal affairs information

Document 1.1 includes photographs of a private property. I am satisfied the photographs were taken by the Business and used as a reference point for particular noise assessments in support of its appeal. I am of the view the property owners may not have had direct involvement with the Business or the infringement matter. As such, I consider the information is sensitive and I am satisfied its disclosure would be unreasonable and is exempt from release under section 33(1).

The Agency refused access to information that was provided by the Business in support of the appeal to the planning infringement notice. I am not satisfied the documents provided by the Business are exempt in full under section 33(1).

Although the documents contain some information capable of identifying persons other than the Applicant, I am not satisfied this renders them exempt in full.

I am satisfied it would be unreasonable to release some identifying information where it was provided on a voluntary basis and in circumstances where an appeal is submitted against an infringement notice.

(b) 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).¹⁹

The Applicant seeks access to the documents to understand the Agency's decision making processes in deciding the infringement appeal. I consider release of certain personal affairs information may provide the Applicant with insight into the Agency's decision making process.

¹⁹ *Victoria Police v Marke* [2008] VSCA 218 at [104].

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

Broadly speaking, I am of the view there is legitimate public interest in the community being informed about the way in which an agency responds to infringement matters, including the process of an appeal.

However, this must be balanced with the public interest in maintaining the confidentiality of such matters where disclosure of information may inhibit an agency from effectively conducting a thorough assessment of an infringement matter. In the circumstances of this matter, I do not consider the broader public interest would be promoted by disclosure of third party personal affairs information.

Accordingly, I am of the view the Applicant's interest in obtaining access to the documents is a matter of private interest and would not promote a public interest.

(d) 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.²⁰

Accordingly, I have considered the likelihood of the personal affairs information being further disseminated, if disclosed, and the effects broader disclosure of this information would have on the privacy of the relevant third parties.

Information before me suggests the documents are likely to be disseminated should they be disclosed. However, as I am of the view certain information is not sensitive in nature, I do not consider this factor weighs against disclosure.

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

The Agency advised it consulted with the relevant Agency officers under section 33(1) and some of the officers did not consent to release of their personal affairs information in the documents. Although I acknowledge the objections of Agency officers, I am of the view the recording of Agency officer names while carrying out their usual employment duties and responsibilities within a professional context is not sensitive and would not be unreasonable to release under these circumstances.

However, I am satisfied direct contact details of Agency officers, such as email addresses and telephone numbers, are considered more sensitive and unreasonable to release under section 33(1).

(f) 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.²¹

There is no information before me to suggest this is a relevant factor in this matter.

²⁰ Ibid at [68].

²¹ Section 33(2A).

54. In weighing up the above factors, on balance, I am satisfied certain information in the documents is the personal information of third parties that would be unreasonable to release. This information is to be distinguished from general information in the documents that relate more closely to the Agency carrying out its statutory functions and responsibilities investigating and responding to an appeal made by a third party.
55. However, I am not satisfied the video footage, certain business information and information that relates to Agency officers carrying out their usual duties and responsibilities is exempt under section 33(1).
56. The Document Schedule in **Annexure 1** details my decision in relation to section 33(1).

Section 34(1)(b) – Disclosure of business affairs information would expose a business undertaking unreasonably to disadvantage

57. While the Agency did not rely on section 34(1)(b) to refuse access to any of the documents subject to review, for completeness, I have considered the application of this exemption in relation to Documents 1, 1.1, 1.2 and 1.3. These documents comprise the Business' appeal application made to the Agency regarding the decision to issue the PIN.
58. Document 1 is a covering email sent by the Business to the Agency's Chief Executive Officer. Document 1.1 is a submission setting out the Business' concerns regarding the Council's decision to issue the PIN. Document 1.2 is video footage of the commercial street in which the Business is located. Document 1.3 is an acoustic report commissioned by the Business from an external consultant and provided to the Agency in support of its appeal application.
59. In this context, I have considered the business affairs information of both the Business in each of these documents, and external consultant that produced the acoustic report.
60. A document is exempt from release under section 34(1)(b) if:
 - (a) the relevant information relates to matters of a business, commercial or financial nature and was acquired by the agency; and
 - (b) disclosure of the information would be likely to expose the relevant business undertaking unreasonably to disadvantage.
61. 'Undertaking' means a private or commercial business entity with which an agency has had financial, commercial or business dealings, or from which the agency has acquired or received documents.²²
62. The phrase 'information acquired' signifies the need for some positive handling over of information in some precise form.²³
63. The words 'business, commercial or financial nature' have their ordinary meaning.²⁴
64. The phrase 'expose the undertaking unreasonably to disadvantage' in section 34(1)(b) contemplates disclosure of a document may involve a certain measure of disadvantage for an undertaking. The issue for consideration is whether an undertaking will be exposed unreasonably to disadvantage.

²² *Thwaites v DHS* [1999] VCAT 11; *Re Marples and Department of Agriculture* (1995) 9 VAR 29 at [56].

²³ *Thwaites v Department of Human Services* (1999) 15 VAR 1.

²⁴ *Gibson v Latrobe CC* [2008] VCAT 1340 at [25].

65. 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 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.

66. I have also had regard to *Dalla-Riva v Department of Treasury and Finance*,²⁵ in which the Victorian Civil and Administrative Tribunal (VCAT) held documents will be exempt under section 34(1)(b) if disclosure would:

- (a) give the undertaking's competitors a financial disadvantage;
- (b) enable competitors to engage in destructive competition with the undertaking; and
- (c) would lead to the drawing of unwanted conclusions as to the undertaking's financial affairs and position with commercial and market consequences.

Does the document contain information related to matters of a business, commercial or financial nature and acquired by the Agency from the business undertaking?

67. In relation to Documents 1, 1.1, 1.2 and 1.3, I am satisfied they contain information related to matters of a business or commercial nature that were acquired by the Agency from the Business.

68. Similarly, in relation to Document 1.3, I am also satisfied it contains information related to matters of a business or commercial nature that relate to the external consultant and were provided to the Agency by the Business in support of its appeal application.

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

69. By the inserting the word 'unreasonably' in section 34(1), it is my view, Parliament determined this exemption will apply only where a business undertaking would be exposed 'unreasonably' to disadvantage.

70. The phrase 'expose the undertaking unreasonably to disadvantage', contemplates disclosure of documents under the FOI Act may expose a business undertaking to a certain measure of disadvantage. I am not persuaded disclosure of the document would expose the business undertaking to unreasonably to disadvantage as contemplated by section 34(1)(b).

71. Having carefully considered the purpose and content of the documents, I am not satisfied their disclosure under the FOI Act would be likely to expose the Business or external consultant unreasonably to disadvantage.

²⁵ [2007] VCAT 1301 at [33].

72. The document assesses noise levels at the Business at a particular time and was submitted to the Agency by the Business in support of its appeal against the PIN. I do not consider disclosure of this document would expose the Business unreasonably to disadvantage for the purpose of section 34(1)(b). I note the Business was consulted by the Agency in relation to its views on disclosure of Documents 1, 1.1, 1.2 and 1.3 in accordance with section 34(3). In summary, the Business objects to release of the documents.
73. In respect to the external consultant and its preparation of Document 1.3, I am satisfied the document does not disclose any specific technical methods or data that could reasonably be used by a competitor that would expose the consultant commercial disadvantage. Further, I note the external consultant was consulted by the Agency in accordance with section 34(3) to ascertain its views on disclosure of Document 1.3 and the external consultant did not respond. I accept no response from the external consultant is an indication that it is not opposed to release of the document.
74. In this case, the Applicant is not a commercial competitor of either the Business or external consultant. However, I acknowledge that the Applicant appears to have concerns about the operation of the Business, including noise levels and local amenity issues.
75. I consider there is a public interest in favour of disclosure of the documents which outweighs considerations of any possible competitive disadvantage to the Business and external consultant given the documents would contribute to the Applicant's understanding of the Agency's exercise of its statutory powers in relation to the regulation of environmental controls. I consider this public interest is consistent with the transparency principals under the *Local Government Act 2020* (Vic).
76. Finally, the appeal lodged by the Business has been completed and a decision made by the Agency. Also, from inquiries made with the Agency, I understand there are no current matters arising from the subject matter of the documents subject to a decision by the Agency or a determination by VCAT or a court.
77. In light of the above factors, I am not satisfied disclosure of Documents 1, 1.1, 1.2 and 1.3 would expose the Business or external consultant unreasonably to disadvantage and, these documents are not exempt from release under section 34(1)(b).
78. The Document Schedule in **Annexure 1** details my decision in relation to section 34(1)(b).

Section 25 – Deletion of exempt or irrelevant information

Irrelevant information in Document 3.2

79. The Agency determined Document 3.2 is irrelevant to the terms of the Applicant's request.
80. Document 3.2 is a letter from the Agency to a third party in relation to a separate planning infringement notice.
81. I agree the terms of the Applicant's request are not broad enough to capture the information in Document 3.2. Accordingly, I am satisfied information in Document 3.2 is to remain deleted in accordance with section 25, as it falls outside the scope of the Applicant's request.

Deletion of exempt and irrelevant information

82. 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.

83. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'²⁶ 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 25.²⁷
84. I have considered the effect of deleting irrelevant and exempt information from the documents. I am satisfied it is practicable to do so as it would not require substantial time and effort, and the edited documents would retain meaning.

Conclusion

85. On the information before me, I am satisfied certain information in the documents is exempt from release under sections 30(1), 32(1) and 33(1). However, I have determined to release additional information that I consider not exempt from release under sections 30(1), 33(1) and 34(1)(b).
86. Where I am satisfied it is practicable to provide the Applicant with an edited copy of a document with exempt information deleted in accordance with section 25, I have determined to grant access to certain documents in part.
87. The Schedule of Documents in **Annexure 1** sets out my decision in relation to each document.
88. Marked-up copies of Documents 1, 1.1, 1.3, 2, 3 and 4 have been provided to the Agency in accordance with my decision.

Review rights

89. If either party to this review is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.²⁸
90. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.²⁹
91. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.³⁰
92. 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.
93. 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.³¹

Third party review rights

94. As I have determined to release documents that contain the personal affairs information of persons other than the Applicant and the names and contact details of two business undertakings,

²⁶ *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].

²⁷ *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].

²⁸ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

²⁹ Section 52(5).

³⁰ Section 52(9).

³¹ Sections 50(3F) and 50(3FA).

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.³²

95. 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.

When this decision takes effect

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

³² Sections 49P(5), 50(3), 50(3A) and 52(3).

Annexure 1 – Schedule of Documents –

Document No.	Date of Document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
1.	[date]	Covering email from the Business to Agency Chief Executive Officer lodging an appeal against PIN with three supporting attachments (Documents 1.1, 1.2 and 1.3)	1	Refused in full Section 33(1)	Release in part Sections 33(1), 25 A marked-up copy of the document indicating information exempt under section 33(1) has been provided to the Agency.	Section 33(1): I have determined certain information in the document is exempt under section 33(1) for the reasons described above in the Notice of Decision. Section 34(1)(b): I have considered the application of section 34(1) to this document. I am not satisfied disclosure of business affairs information would expose the Business unreasonably to disadvantage for the reasons outlined in the Notice of Decision above. 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.
1.1.	[date]	Attachment 1 Covering letter from the Business to the Agency regarding appeal of the PIN	11	Refused in full Section 33(1)	Release in part Sections 33(1), 25 A marked-up copy of the document indicating information exempt under	Section 33(1): See comments for Document 1. Section 34(1)(b): See comments for Document 1. Section 25: See comments for Document 1.

Document No.	Date of Document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
					section 33(1) has been provided to the Agency.	
1.2.	[date]	Attachment 2 Video footage	-	Refused in full Section 33(1)	Release in full	<p>Section 33(1): I am not satisfied the video footage constitutes third party personal affairs information for the purposes of section 33(1) as outlined in the Notice of Decision above.</p> <p>Section 34(1)(b): See comments for Document 1.</p> <p>Section 34(1)(b): See comments for Document 1.</p>
1.3.	[date]	Attachment 3 Acoustic Report	23	Refused in full Section 33(1)	<p>Release in part Sections 33(1), 25</p> <p>A marked-up copy of the document indicating information exempt under section 33(1) has been provided to the Agency.</p>	<p>Section 33(1): See comments for Document 1.</p> <p>Section 34(1)(b): See comments for Document 1.</p> <p>Section 25: See comments for Document 1.</p>
2.	[date]	Agency internal email chain commencing with email from CEO to Agency	3	Released in part Sections 30(1), 33(1)	Release in part Sections 33(1), 25	Section 30(1): I am not satisfied information in the document is exempt from release under section 30(1) for the reasons

Document No.	Date of Document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
		officers regarding appeal against PIN			A marked-up copy of the document indicating information exempt under section 33(1) has been provided to the Agency.	outlined in the Notice of Decision above. Section 33(1): See comments for Document 1. Section 25: See comments for Document 1.
2.1.	[date]	2.1 (attachment) Covering letter from the Business to the Agency regarding appeal of the PIN	11	Refused in full Section 33(1)	Not subject to review	Duplicate document. Same as attachment 1.1.
2.2.	[date]	2.2 (attachment) Video footage	-	Refused in full Section 33(1)	Not subject to review	Duplicate document. Same as attachment 1.2.
2.3.	[date]	2.3 (attachment) Acoustic Report	23	Refused in full Section 33(1)	Not subject to review	Duplicate document. Same as attachment 1.3.
2.4.	[date]	2.4 [22 126117] link within body of email - https://www.justice.vic.gov.au/internal-review-guidelines-fines-and-enforcement-services .	-	Public document Website link provided to Applicant	Not subject to review	
3.	[date]	Emails between Agency officers	4	Released in part Sections 30(1), 33(1)	Release in part	Section 30(1): I am satisfied certain information in the

Document No.	Date of Document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
					<p>Sections 30(1), 32(1), 33(1), 25</p> <p>A marked-up copy of the document indicating information exempt under sections 30(1), 32(1) and 33(1) has been provided to the Agency.</p>	<p>document is exempt from release under section 30(1). However, I have determined to release additional information where it is not exempt for the reasons outlined in the Notice of Decision above.</p> <p>Section 32(1): The document contains confidential communications between the Agency and its external legal adviser that was made for the dominant purpose of obtaining and providing legal advice. Accordingly, I am satisfied information in the document is exempt under section 32(1).</p> <p>Section 33(1): See comments for Document 1.</p> <p>Section 25: I am satisfied it is practicable to provide the Applicant with an edited copy of the document with irrelevant and exempt information deleted in accordance with section 25.</p>
3.1.	N/A	3.1 (attachment) Document Application To Have The Infringement	2	Released in full	Not subject to review	

Document No.	Date of Document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
		Notice Internally Reviewed				
3.2.	[date]	3.2 (attachment) Emails between Agency officers attaching example of an internal review for an unrelated PIN appeal matter	4	Refused in full Section 25	Irrelevant information Section 25	Section 25: I am satisfied this document does not concern the Planning Infringement Notice or the business the subject of the Applicant's FOI request and falls outside the scope of the request. Accordingly, this document is irrelevant information for the purpose of section 25.
4.	[date]	Agency Internal Review of Infringement and Peer Review Form	4	Released in part Sections 30(1), 33(1)	Release in part Sections 32(1), 33(1), 25 A marked-up copy of the document with the personal affairs information of third parties, other than Agency officers, and legally privileged information deleted in accordance with section 25 has been provided to the Agency.	Section 30(1): See comments for Document 3. Section 32(1): See comments for Document 3. Section 33(1): See comments for Document 1. Section 25: See comments for Document 1.
5.	[date]	[22 205597] – Email RE Appeal to Planning	2	Released in part Section 33(1)	Not subject to review	

Document No.	Date of Document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
		Infringement Notice and issue warning notice				
5.1.	[date]	5.1 (attachment) Document ENF - Official Warning Notice – [third party] – [address] – [date]	1	Released in part Section 33(1)	Not subject to review	
5.2.	[date]	5.2 (attachment) Document Withdrawal PIN115 – [third party] – [address] – [date]	3	Released in part Section 33(1)	Not subject to review	
6.	[date]	22 165867 – Document Planning Infringement Notice	3	Released in part Section 33(1)	Not subject to review	