

Notice of Decision and Reasons for Decision

Applicant:	'FC1'
Agency:	Department of Energy, Environment and Climate Action (formerly the Department of Environment, Land, Water and Planning)
Decision date:	14 April 2023
Exemptions considered:	Sections 30(1), 35(1)(b)
Citation:	'FC1' and Department of Energy, Environment, and Climate Change (Freedom of Information) [2023] VICmr 27 (14 April 2023)

FREEDOM OF INFORMATION – Victorian Building Authority (VBA) – regulatory agency – *Building Act 1993* (Vic) – statutory functions and obligations – construction industry – building industry – report – research – building and plumbing work faults – non-compliant building and plumbing works

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 not satisfied the documents are exempt from release under section 35(1). Accordingly, the documents are to be released to the Applicant in full.

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
14 April 2023

Reasons for Decision

Background to review

1. The Applicant made a request to the former Department of Environment, Land, Water and Planning (**DELWP**) seeking access to the following documents:
 - Any reports and/or reviews the Victorian government has commissioned into the weather-tightness and/or issue of leaking, and/or water ingress, and/or mould, of/in buildings since 2010.
 - Any documents concerning groups and/or panels and/or external consultants appointed by the Victorian government to look into the weather-tightness and/or issue of leaking and/or mould, of/in buildings, including houses and apartments, since 2010.
2. DELWP identified three documents falling within the terms of the Applicant's request. Document 1 is available publicly and DELWP provided a link to it. DELWP refused access to Documents 2 and 3 in full under section 35(1)(b). DELWP's decision letter sets out the reasons for its decision.
3. Following the Victorian Election in November 2022, the Agency was replaced by the new Department of Energy, Environment and Climate Action (the **Agency**), which has taken over the handling of this matter under 'machinery of government' (**MoG**) changes.

Review application

4. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
5. I have examined a copy of the two documents subject to review.
6. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
7. I have considered all communications and submissions received from the parties.
8. 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.
9. 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.
10. 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.

Review of exemptions

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

11. A document is exempt under section 35(1)(b) if two conditions are satisfied:

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

- (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?

- 12. Whether information communicated by an individual to an agency was communicated in confidence is a question of fact.² 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.³
- 13. Document 2 was commissioned by the Victorian Building Authority (**VBA**) and was prepared by an external consultant. Document 3 was prepared by the VBA. Prior to making its decision, the Agency consulted with the VBA as required under section 35(1A) to ascertain its views on disclosure of the documents.
- 14. The VBA's responded:

The VBA considers neither report should be released, for the following reasons:

- 1. The information in both reports is dated, and so the data those reports were premised on was dated at the time they were prepared.
 - 2. The VBA's governance process for the release of research reports requires the approval of both the Research and Innovation Committee (RIC) and the Board. For both reports, the RIC and Board approved only a limited release to selected external stakeholders. Given the limitations of both reports, a recommendation was made to the Board for this limited release only.
 - 3. These reports were therefore provided to the department in confidence with an expectation they would not be further disclosed. Were the reports to be released by DELWP, the VBA would have to take that into account in assessing whether to disclose similar information to the department in the future. The VBA is not aware of any other means by which the department could easily obtain such information (research funded by the VBA) in the future if it is not provided by the VBA.
- 15. Given the above information, I accept the VBA provided Documents 2 and 3 to the Agency in confidence.
 - 16. As the documents were created on behalf of or by the VBA, the VBA was further consulted during the review to obtain its views in relation to release of the documents. No further information was provided by the VBA in support of its decision.

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

- 17. The public interest test in section 35(1)(b) is narrow, in that it is focused on the impact release of a confidential document would have on an agency's ability to obtain similar information in the future. The exemption will not be made out if an agency's impairment goes no further than showing potential future communicator of the same or similar information may be less candid than they would otherwise have been.⁴
- 18. Having considered the content and context in which the documents were created, I am not satisfied their disclosure would impair the Agency from receiving similar information from the VBA (or any similar statutory agency with regulatory functions) in the future for the following reasons:

² *Ryder v Booth* [1985] VR 869 at [883]; *XYZ v Victoria Police* [2010] VCAT 255 at [264].

³ *XYZ v Victoria Police* [2010] VCAT 255 at [265].

⁴ *Smeaton v Victorian WorkCover Authority* [2012] VCAT 1549 at [69], approving *Birnbauer v Inner and Eastern Health Care Network* [1999] 16 VAR 9.

- (a) The VBA is established under the *Building Act 1993 (Vic)* (**Building Act**). The agency's website states it 'regulates building and plumbing practitioners to ensure the achievement of efficient and competitive building and plumbing industries in Victoria'.⁵
- (b) The Agency and the VBA have statutory obligations that require them to cooperate and share information, research and reports in order to fulfil their respective governmental and regulatory functions. I do not consider disclosure of these particular documents under the FOI Act would impact upon the requirement for each of agency to share information where their statutory, regulatory and governmental responsibilities intersect.
- (c) The exemption under section 35(1)(b) requires that the impact of disclosure of a document must be more than minimal. There is no objective information before me to substantiate the claims of the Agency and the VBA that disclosure of these particular documents would impact the Agency's ability to obtain similar information from the VBA in the future.
- (d) I have considered the above in light of the contents of the documents – where each document is at a well developed phase, if not finalised, and clearly sets out the document's purpose and limitations. In these circumstances, I am not satisfied disclosure would be contrary to the public interest as it would be reasonably likely to impair the ability of the Agency to obtain similar information in the future.

19. The Schedule of Documents in **Annexure 1** outlines my decision in relation to section 35(1)(b).

Section 35(1)(a) – Information communicated in confidence to an agency that would be exempt if generated by an agency

- 20. For completeness, and given the documents were prepared by another government agency, I have also considered the possible application of section 35(1)(a).
- 21. A document is exempt from release under section 35(1)(a) 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) the information would be exempt matter if it were generated by an agency or Minister.
- 22. As described above, I am satisfied the documents were received in confidence by the Agency from the VBA. Therefore, given the second condition above overlaps with the requirements for the exemption under section 30(1), I have considered whether they would be exempt from release under section 30(1).

Section 30(1) – Internal working documents

- 23. 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.

⁵ Victorian Building Authority, 'Our role' at <https://www.vba.vic.gov.au/about/our-role>.

24. The exemption does not apply to purely factual material in a document.⁶

Do the documents 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?

25. 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.

26. 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.⁷

27. 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 or not they are subject to the *Public Administration Act 2004 (Vic)*.

28. I accept Document 1 was prepared by Agency officers and Document 2 was prepared by an external consultant on behalf of the VBA. In these circumstances, I am satisfied the documents were prepared by officers of the Agency for the purposes of the FOI Act.

29. The documents are reports that provide assessments of certain aspects of building and plumbing regulation in Victoria. While they contain some factual information, overall I accept they contain the opinion, advice and recommendations of Agency officers.

30. Accordingly, I am satisfied the first condition of section 30(1) is met.

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?

31. 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.⁸

32. In *Re Waterford and Department of Treasury (No.2)*,⁹ 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.

33. I am satisfied the documents were prepared for the deliberative processes of the VBA in its capacity of a statutory regulator and in the context of carrying out its functions involved in the regulation of building and plumbing in Victoria.

34. Accordingly, I am satisfied the second condition of section 30(1) is met.

⁶ Section 30(3).

⁷ *Mildenhall v Department of Education* (1998) 14 VAR 87.

⁸ *Brog v Department of Premier and Cabinet* (1989) 3 VAR 201 at [208]; *Re Waterford v Department of Treasury (No 2)* [1984] 1 AAR 1 at [58].

⁹ [1984] AATA 67; (1984) 5 ALD 588; 1 AAR 1 at [58].

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

35. 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:¹⁰
- (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.
36. Having reviewed the content of Documents 2 and 3 and considered their context and purpose, I am satisfied it would not be contrary to the public interest to release the documents for the following reasons:
- (a) The documents were prepared approximately five years ago in or around 2018.
 - (b) In February 2023, the VBA published information of a similar nature on its website.¹¹ Having done so, it is not clear on the information before me why a similar document subject to review should not also be publicly available or able to be released under the FOI Act upon request.
 - (c) Should there be a need to do so, it is open to the Agency or VBA to explain the differences between the documents and any action taken or changes that have occurred in the intervening period. In any case, I consider members of the public are capable of understanding such documents are created at a point in time and subject to change as more information becomes available or action is taken to address the underlying issues.
 - (d) While the VBA submits one of the documents contains sensitive information that relates to the public safety of buildings, in my view, the document clearly sets out its limitations, the stage in the process in which it was prepared, and notes that further work is required. As such, it is clear from the face of the document that it provides an opinion at a particular point in time. If the VBA has conducted further work that supersedes the document, it is open to it to

¹⁰ *Hulls v Victorian Casino and Gambling Authority* (1998) 12 VAR 483 at 488.

¹¹ Victorian Building Authority, 'New water damage research provides insights for safer homes' (1 February 2023) <https://www.vba.vic.gov.au/news/news/2023/new-water-damage-research-provides-insights-for-safer-homes>.

provide explanatory information to the Applicant to provide greater context for the document and the issues under consideration.

- (e) The public interest weighs in favour of disclosure given the general community's interest and the impact on the public of any faulty or non-complaint construction of residential buildings where it may be occurring on a broader scale. Accordingly, I consider disclosure of the document would ensure the underlying issues will be subject to greater public scrutiny. As such, I consider the public interest lies in disclosure of the document rather than maintaining secrecy as to its contents.
- (f) Similarly, the documents allow the community to be better informed about the way in which the VBA is meeting its statutory obligations under the Building Act as the regulator of building and plumbing works in Victoria.

37. Accordingly, I am not satisfied the third condition of section 30(1) is met and the documents are not exempt from release under section 35(1)(a).

Conclusion

38. On the information before me, I am not satisfied the documents are exempt from release under sections 35(1). Accordingly, the documents are to be released to the Applicant in full.

Review rights

- 39. 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.¹²
- 40. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹³
- 41. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹⁴
- 42. 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.
- 43. 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.¹⁵

Third party review rights

- 44. As I have determined to release documents to which the Agency refused access under section 35(1)(b), if practicable, I am required to notify the VBA of its right to seek review by VCAT of my decision within 60 days from the date it is given notice.¹⁶
- 45. In this case, it is practicable to notify the VBA of its review rights and it will be notified of my decision.

When this decision takes effect

46. My decision does not take effect until the VBA's 60 day third party review period expires.

¹² The Applicant in section 50(1)(b) and the Agency in section 50(3D).

¹³ Section 52(5).

¹⁴ Section 52(9).

¹⁵ Sections 50(3F) and 50(3FA).

¹⁶ Section 50(3AB) and 52(3).

47. 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
1	2017	Regulatory Impact Statement Building Regulations 2017: Part B: Design, construction, completion/use and other topics	193	Released in full	Not subject to review
2	2018	Report on non-compliance with roofing (stormwater) works	80	Refused in full Section 35(1)(b)	Release in full
3	Undated	Responding to Faults in Building and Plumbing Work: findings and next steps	32	Refused in full Section 35(1)(b)	Release in full