

Notice of Decision and Reasons for Decision

Applicant:	'FG2'
Agency:	Department of Government Services
Decision date:	23 June 2023
Exemption considered:	Section 38
Citation:	'FG2' and Department of Government Services (Freedom of Information) [2023] VICmr 64 (23 June 2023)

FREEDOM OF INFORMATION – *Business Licensing Authority Act 1988* (Vic) – *Professional Engineers Registration Act 2019* (Vic) – professional licensing – registration of engineer

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 is the same as the Agency's decision in that section 38 applies to the documents 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

23 June 2023

Reasons for Decision

Background to review

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

All documents pertaining to the Professional Engineers registration of [Named individual], including: documents/information provided by third party agencies, such as the Victoria Building Authority, the Australian Securities and Investments Commission (ASIC) and Victoria Police, and any information provided by the registrant, for the purposes of the application and the renewal of that registration and ongoing monitoring requirements, any complaints received in relation to the registrant and disciplinary action taken.

2. The Agency identified 61 pages of documents falling within the terms of the Applicant's request and refused access to all documents in full under section 38 in conjunction with section 18 of the *Business Licensing Authority Act 1998* (Vic) (the **BLA Act**). The Agency's decision letter sets out the reasons for its decision.

Review application

3. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
4. I have examined a copy of the documents subject to review.
5. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
6. I have considered all communications and submissions received from the parties.
7. In undertaking my review, I have had regard to the object of the FOI Act, which is to create a general right of access to information in the possession of the Government or other public bodies, limited only by exceptions and exemptions necessary to protect essential public interests, privacy and business affairs.
8. I note Parliament's intention the FOI Act must be interpreted so as to further the object of the Act and any discretions conferred by the Act must be exercised, as far as possible, so as to facilitate and promote the disclosure of information in a timely manner and at the lowest reasonable cost.

Review of exemptions

Section 38 – Documents to which a secrecy provision applies

9. Section 38 provides:

38 Documents to which secrecy provisions of enactments apply

A document is an exempt document if there is in force an enactment applying specifically to information of a kind contained in the document and prohibiting persons referred to in the enactment from disclosing information of that kind, whether the prohibition is absolute or is subject to exceptions or qualifications.

10. Therefore, for a document to be exempt under section 38, three conditions must be satisfied:
 - (a) there must be an enactment in force;
 - (b) the enactment must be formulated with such precision that it specifies the actual information prohibited from disclosure in the document; and
 - (c) the enactment must prohibit persons referred to in the enactment from disclosing the specific kind of information in the document, either absolutely or subject to exceptions or qualifications.

Is there an enactment in force?

11. The BLA Act establishes the Business Licensing Authority (the **Authority**). The Authority's functions are set out in section 6 of the BLA Act, and relevantly for the purposes of this decision, include to administer the licensing and registration provisions of the *Professional Engineers Registration Act 2019* (Vic) (the **PER Act**).
12. It is under these two Acts that information has been collected about the named person that is sought by the Applicant under the FOI Act.
13. I am satisfied the BLA Act and the PER Act are enactments in force.

Does the enactment apply specifically to the kind of information in the documents?

14. In order for section 38 to apply to an enactment, the enactment must be formulated with such precision that it specifies the actual information sought to be withheld.
15. Section 18 of the BLA Act provides:

18 Secrecy

- (1) This section applies to every person who is or has been a member of the Authority, the Registrar, a Deputy Registrar, a member of the other staff assisting the Authority, a person whose services are used by the Authority under section 7(2) or a person engaged under section 8.

...

- (2) A person to whom this section applies must not, either directly or indirectly, make a record of, or disclose or communicate to any person, any information concerning the affairs of any person acquired by reason of the office or employment under or for the purposes of this Act or a business licensing Act.

Penalty:

- (a) in relation to information on the register referred to in section 17AB, 60 penalty units;
 - (b) in any other case, 5 penalty units.
- (3) Despite subsection (2), a person to whom this section applies may—
 - (a) make a record of, or disclose or communicate any information referred to in that subsection—
 - (i) in any legal proceedings under this Act or any of the business licensing Acts; or

- (ii) in the performance of a duty under or in connection with this Act or any of the business licensing Acts;
- (b) divulge or communicate any information referred to in that subsection to—
 - (i) the Director; or
 - (ii) the Tribunal; or
 - (iii) a police officer for the purposes of reporting a suspected offence or assisting in the investigation of a suspected offence; or
 - (iv) a police officer who is performing a duty under or in connection with any Act; or
 - (v) a prescribed person who is, or a prescribed body which is, performing a duty under or in connection with any Act; or
 - (va) to an agency of the Commonwealth, the extent reasonably required to bring into operation the National Consumer Credit Protection Act 2009 of the Commonwealth and the National Consumer Credit Protection (Transitional and Consequential Provisions) Act 2009 of the Commonwealth; or
 - (vi) with the consent of the person to whom the information relates, to any other person.

16. The Applicant is seeking all documents pertaining to the professional engineers registration of a named individual. I am satisfied this information is the ‘affairs of any person’ acquired by the Agency and therefore falls within section 18(2) of the BLA Act described above.

Does the enactment prohibit persons from disclosing the information in the document(s)?

17. Section 18(2) of the BLA Act provides that the Agency must not disclose any information about concerning the affairs of any person ‘acquired by reason of the office or employment under or for the purposes of this Act or a business licensing Act’. I am satisfied this provision of the BLA Act prohibits disclosure of the information sought by the applicant.

18. Further, I am satisfied the exceptions provided for in section 18(3) of the BLA Act do not apply.

19. Accordingly, I am satisfied section 38 in conjunction with section 18(2) of the BLA Act applies to the documents.

Section 25 – Deletion of exempt or irrelevant information

20. 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.

21. Determining what is ‘practicable’ requires consideration of the effort and editing involved in making the deletions ‘from a resources point of view’¹ and the effectiveness of the deletions.

¹ *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].

Where deletions would render a document meaningless, they are not 'practicable', and release of the document is not required under section 25.²

Conclusion

22. On the information before me, I am satisfied the documents are exempt from release under section 38 in conjunction with section 18(2) of the BLA Act.
23. As I am satisfied it is not practicable to provide the Applicant with an edited copy of the documents with exempt information deleted in accordance with section 25, access is refused in full.

Review rights

24. 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.³
25. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.⁴
26. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.⁵
27. 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.
28. 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.⁶
29. If a review application is made to VCAT, my decision will be subject to any VCAT determination.

² *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].

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

⁴ Section 52(5).

⁵ Section 52(9).

⁶ Sections 50(3F) and 50(3FA).