



Office of the Victorian  
Information Commissioner

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## Notice of Decision and Reasons for Decision

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Applicant:	'FJ3'
Agency:	Veterinary Practitioners Registration Board of Victoria
Decision date:	16 December 2022
Exemptions considered:	Sections 31(1)(a) and 38, in conjunction with section 77(1) of the <i>Veterinary Practice Act 1997</i> (Vic)
Citation:	'FJ3' and <i>Veterinary Practitioners Registration Board of Victoria</i> (Freedom of Information) [2023] VICmr 257 (16 December 2022)

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FREEDOM OF INFORMATION – regulatory document – registered professional – allegations – alleged misconduct – investigation – disclosure would prejudice the agency's enforcement and proper administration of the law – section 77(1) of the *Veterinary Practice Act 1997*, not a secrecy provision for the purpose of section 38 of the FOI Act

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 a document requested by the Applicant under the FOI Act.

I am satisfied the document is exempt from release under section 31(1)(a).

As I am satisfied it is not practicable to provide the Applicant with an edited copy of the document with exempt information deleted in accordance with section 25, access to the document is refused in full.

My reasons for decision follow.

**Joanne Kummrow**

Public Access Deputy Commissioner

16 December 2022

## Reasons for Decision

### Background to review

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

...the decision of the Veterinary Practitioners Registration Board (the Board) dated [date] in which it found [named third party] had engaged in unprofessional conduct of a serious nature and imposed a suspension of [number of] months. [Contextual information redacted]
2. The Agency identified an 18 page document falling within the terms of the Applicant's request and refused access to the document in full under section 38 of the FOI Act in conjunction with section 77(1) of the *Veterinary Practice Act 1997* (Vic) (**VP 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 document 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

9. 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'.<sup>1</sup> 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.
10. In this case, the Agency refused access to the document under section 38 in conjunction with the VP Act. However, in conducting my review I have determined the appropriate exemption for consideration is section 31(1)(a).
11. Both the Applicant and the Agency were provided with my preliminary view in relation to the application of section 38 and an additional exemption under section 31(1)(a). Each was invited to respond to the preliminary view and their responses have been taken into account in my decision.

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

**Section 31(1)(a) – Disclosure of a document would prejudice the enforcement or proper administration of the law**

12. Section 31(1)(a) concerns ‘law enforcement documents’ and provides ‘a document is an exempt document if its disclosure under this Act would, or would be reasonably likely to prejudice the investigation of a breach or possible breach of the law or prejudice the enforcement or proper administration of the law in a particular instance’. Section 31(1)(a) is subject to other provisions under section 31.
13. ‘Reasonably likely’ means there is a real chance of an event occurring; it is not fanciful or remote.<sup>2</sup>
14. ‘Prejudice’ means to hinder, impair or undermine and includes actual prejudice as well as impending prejudice.<sup>3</sup>
15. ‘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.<sup>4</sup>
16. The ‘enforcement of the law’ deals with the process of enforcing of the law, whereas the ‘proper administration of the law’ concerns how the law is administered, for example, regulatory, monitoring and compliance activities.<sup>5</sup>
17. The Agency submits disclosure of the document would prejudice its enforcement of the VP Act for the following reasons:

The enforcement or proper administration of the law (namely, the holding of hearings under the VP Act) may be prejudiced if the Reasons are disclosed beyond the three types of persons named in sections 51 and 52(4)(c) of the VP Act; namely, that veterinary practitioners the subject of disciplinary hearings may be deterred from giving full and frank evidence during a hearing into their professional conduct and may be deterred from making admissions or entering into “Agreed Statements of Fact” and/or “Findings” should they believe that this information could be shared or released publicly. This would mean that the Board would be required to prove each aspect of its case against a veterinary practitioner who may, but for the fear of information being made publicly available, have otherwise made admissions or signed “Agreed Statements of Fact” and/or “Findings. Having to prove each aspect of a case because of a veterinary practitioner’s fear of public disclosure would significantly extend the time hearings would take, increase the demand on the Board’s limited resources and significantly increase the costs of the hearing to all parties.

18. In relation to the availability of Hearing Reasons, the Agency further submits:

The range of determinations available to a formal hearing panel under section 45(2) of the VP Act does not include publication of the Reasons.

Given that the purposes of the determinations made by a hearing panel include mitigation of the risk to the health and safety of the public and health and wellbeing of animals, it is difficult to see how disclosure of the Reasons may be required to reduce risks to the health, safety and wellbeing of members of the public or the health and welfare of animals – indeed, this is the role of the determinations made by the hearing panel and additional steps taken by the Board in response to the conduct outside the parameters of the formal hearing (i.e. by making the Reasons public) may undermine (or prejudice) the formal hearing process and thereby the proper administration and enforcement of the VP Act.

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<sup>2</sup> *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.

<sup>3</sup> *Ibid*, Bergman at [66], referring to *Sobh v Police Force of Victoria* [1994] VicRp 2; [1994] 1 VR 41 (Nathan J) at [55].

<sup>4</sup> *Cichello v Department of Justice (Review and Regulation)* [2014] VCAT 340 at [24].

<sup>5</sup> *Cichello v Department of Justice* [2014] VCAT 340 at [23], referring to *JCL v Victoria Police* [2012] VCAT 1060 at [28]; *Croom v Accident Compensation Commission* (1989) 3 VAR 441, affirmed on appeal [1991] 2 VR 322.

19. I note the Applicant is not a party to the relevant disciplinary proceeding or the formal hearing into the third party's conduct.
20. The Applicant submits disclosure of the document would not prejudice the proper administration of the law in that:

The relevant individuals have been provided with the reasons for the decision; the law has been administered properly and there it is unclear how the further release of those reasons, either in response to the Applicant's FOI request or otherwise, would "prejudice" the administration of those provisions of the law in the particular circumstances.

Furthermore, and as stated above, the release of the reasons for decision in response to the Applicant's FOI request would, in fact, be in keeping with the legislature's intent in enacting s 44(d) of the VP Act, providing for the "proceeding", as a whole to be open to the public (not merely for the public to have access to the hearing).

21. I have considered the Applicant's submission in which they state their view that judgements and decisions by courts and tribunals must be made public as stipulated, in their view, by the *Charter of Human Rights and Responsibilities 2006* (Vic).
22. In considering the application of section 31(1)(a), I have had regard to the nature of disclosure under the FOI Act, which provides for disclosure without any conditions or restrictions on an applicant's future use or further dissemination of a document. This is in contrast to legal proceedings, where restrictions can be placed on the use of a document. Accordingly, I have considered the likelihood and potential effects of further dissemination of the document.
23. I accept the Agency's submission and consider disclosure of the document would be reasonably likely to prejudice the Agency's enforcement and proper administration of the VP Act.
24. I have also carefully reviewed the VP Act and the provisions in the VP Act concerning disciplinary hearings and reasons for decision. I consider these provisions read as a whole make it clear who can be informed about the outcome of a hearing and whether reasons are to be provided.
25. In this matter, where the applicant is not a complainant under the VP Act, but a third party to the matter, I am satisfied the requested document is exempt from release under section 31(1)(a) in that its disclosure under the FOI Act would, or would be reasonably likely to prejudice the enforcement or proper administration of the VP Act in that it would be contrary to the provisions and scheme for disciplinary hearings and reasons for decision in that Act.
26. Further, I am also satisfied that none of the exceptions under section 31(2) apply in this instance.
27. Accordingly, I am satisfied the document is exempt from release under section 31(1)(a).

***Section 38 in conjunction with section 77(1) of the VP Act***

28. Given my decision in relation to section 31(1)(a), it is not necessary for me to also consider the application of section 38 of the FOI Act in conjunction with section 77(1) of the VP Act to the same information.
29. However, as expressed in my preliminary view provided to both the Applicant and Agency, in my opinion, section 77(1) of the VP Act is not a secrecy provision for the purpose of section 38.
30. Section 77(1) prohibits persons who have been members of the Agency or members of its staff or Board from disclosing information obtained in the course of their duties. As such it is not drafted with sufficient specificity to make it a secrecy provision. Rather, it refers to 'information' generally

obtained in connection with the administration of the VP Act and does not refer with particularity to the information or the kind of information in question.<sup>6</sup>

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

31. 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.
32. Determining what is ‘practicable’ requires consideration of the effort and editing involved in making the deletions ‘from a resources point of view’<sup>7</sup> and the effectiveness of the deletions. Where deletions would render a document meaningless, they are not ‘practicable’ and release of the document is not required under section 25.<sup>8</sup>
33. I have considered the effect of deleting exempt information from the document. I am satisfied to do so is not practicable as it would render the document meaningless given the amount of information to be deleted.

### **Conclusion**

34. On the information before me, I am satisfied information in the document is exempt from release under section 31(1)(a).
35. As I am satisfied it is not practicable to provide the Applicant with an edited copy of the document with exempt information deleted in accordance with section 25, access is refused in full.

### **Review rights**

36. If either party to this review is not satisfied with my decision, they are entitled to apply to the Victorian Civil and Administrative Tribunal (**VCAT**) for it to be reviewed.<sup>9</sup>
37. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.<sup>10</sup>
38. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.<sup>11</sup>
39. Information about how to apply to VCAT is available online at [www.vcat.vic.gov.au](http://www.vcat.vic.gov.au). Alternatively, VCAT may be contacted by email at [admin@vcat.vic.gov.au](mailto:admin@vcat.vic.gov.au) or by telephone on 1300 018 228.
40. The Agency is required to notify the Information Commissioner in writing as soon as practicable if either party applies to VCAT for a review of my decision.<sup>12</sup>

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

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

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<sup>6</sup> *Al-Hakim v Ombudsman* [2001] VCAT 1972.

<sup>7</sup> *Mickelborough v Victoria Police (General)* [2009] VCAT 2786 at [31]; *The Herald and Weekly Times Pty Limited v The Office of the Premier (General)* [2012] VCAT 967 at [82].

<sup>8</sup> *Honeywood v Department of Human Services* [2006] VCAT 2048 at [26]; *RFJ v Victoria Police FOI Division (Review and Regulation)* [2013] VCAT 1267 at [140], [155].

<sup>9</sup> The Applicant in section 50(1)(b) and the Agency in section 50(3D).

<sup>10</sup> Section 52(5).

<sup>11</sup> Section 52(9).

<sup>12</sup> Sections 50(3F) and 50(3FA).