

## Notice of Decision and Reasons for Decision

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Applicant:	'FC9'
Agency:	Hepburn Shire Council
Decision date:	27 April 2023
Exemption and provisions considered:	Sections 33(1), 25
Citation:	'FC9' and Hepburn Shire Council (Freedom of Information) [2023] VICmr 35 (27 April 2023)

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FREEDOM OF INFORMATION – council documents – residential report – engineer’s report – dispute between neighbours – disclosure of complainant’s name unreasonable – personal affairs information of third parties

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.

While I am satisfied certain information is exempt from release under section 33(1) in Document 1, I am not satisfied information to which the Agency refused access under section 33(1) in Document 2 is exempt from release.

As I am satisfied it is practicable to provide the Applicant with an edited copy of Document 1 with exempt information deleted in accordance with section 25, access to the document is granted in part.

The Schedule of Documents in **Annexure 1** sets out my decision in relation to each document and the Agency has been provided with a marked-up copy of the documents indicating information to be released to the Applicant.

My reasons for decision follow.

Joanne Kummrow  
**Public Access Deputy Commissioner**  
27 April 2023

## Reasons for Decision

### Background to review

1. The Applicant made a request to the Agency for access to certain documents. Following consultation with the Agency, the Applicant clarified the terms of their request to:  
  
Date Range: [date range]  
  
Copy of the structural engineering report pertaining [building issue 1] and a fire engineers report pertaining to [building issue 2], both in relation to [address]
2. The Agency identified two documents comprising seven pages falling within the terms of the Applicant's request and refused access to one document in full and one document in part under section 33(1). 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.
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.

### Review of exemptions

#### ***Section 33(1) – personal affairs information of third parties***

10. A document is exempt from release under section 33(1) if two conditions are satisfied:

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

- (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**);<sup>2</sup> and
- (b) such disclosure would be ‘unreasonable’.

*Do the documents contain a third party’s personal affairs information?*

- 11. 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.<sup>3</sup>
- 12. A document will disclose a third party’s personal affairs information if it is capable, either directly or indirectly, of identifying that person. 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.<sup>4</sup>
- 13. I am satisfied the documents include the personal affairs information of Agency officers and other third parties. This includes names and position titles, contact details and other personal information provided to the Agency by third parties.

*Would disclosure of the personal affairs information be unreasonable?*

- 14. 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 particular circumstances.
- 15. In *Victoria Police v Marke*,<sup>5</sup> 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’.<sup>6</sup> 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’.<sup>7</sup>
- 16. In determining whether disclosure of the 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 documents were prepared by a contractor as part of a dispute between the Applicant and their neighbour. The information was collected by the Agency in the

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<sup>2</sup> Sections 33(1) and 33(2).

<sup>3</sup> Section 33(9).

<sup>4</sup> *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].

<sup>5</sup> [2008] VSCA 218 at [76].

<sup>6</sup> *Ibid.*

<sup>7</sup> *Ibid* at [79].

course of carrying out its regulatory and enforcement functions in relation to investigating building matters in its local government area.

In these circumstances, I am of the view the parties provided their personal affairs information to the Agency on the understanding it was being collected for the purpose of the Agency carrying out its law enforcement and regulatory functions. I consider it is reasonably likely the complainant would not expect their personal affairs information would be disclosed by the Agency under the FOI Act.

In relation to third parties' names and addresses, I note the Applicant may have had direct contact with certain parties named in the documents. Nevertheless, even where an applicant claims to know the identity of a third party, disclosure of the third party's personal affairs information under the FOI Act may still be unreasonable in the circumstances.<sup>8</sup>

(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).<sup>9</sup>

I understand the Applicant seeks access to personal affairs information such as the name and qualification of the report's author as well as the contents of the report, to provide this information to a third party agency.

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

While I note the Applicant's interest in obtaining access to documents that concern the property next to theirs, I do not consider the public interest would be promoted by the release of the requested documents.

In my view, the public interest weighs against disclosure of information provided to Agencies on a voluntary basis upon which rely to meet their law enforcement and regulatory functions, including in relation to planning and development matters and disputes.

(d) The likelihood the information will be further disclosure, 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.<sup>10</sup>

There is no information before me that indicates the information will be further disseminated, beyond being provided to a third party agency.

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<sup>8</sup> *AB v Department of Education and Early Childhood Development* [2011] VCAT 1263 at [58]; *Akers v Victoria Police* [2003] VCAT 397.

<sup>9</sup> *Victoria Police v Marke* [2008] VSCA 218 at [104].

<sup>10</sup> *Ibid* at [68].

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

In deciding whether disclosure of a document would involve the unreasonable disclosure of a third party's personal affairs information, an agency must notify that person an FOI request has been received for documents containing their personal information and seek their view as to whether disclosure of the document should occur.<sup>11</sup> However, this obligation does not arise including if it is not practicable to do so.<sup>12</sup>

The Agency advised it did not undertake consultation with certain third parties as it was of the view it was not practicable to do so. The remaining third parties that were consulted provided their responses to the Agency. I have considered these responses.

- (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.<sup>13</sup> Having regard to the circumstances of this matter, I am not able to discount this as a relevant factor.

17. Having regard to the above factors, I am satisfied disclosure of certain third party personal affairs information would be unreasonable in these circumstances. In particular, I consider there is a broader public interest in individuals being able to voluntarily provide their personal affairs information to the Agency in connection with it carrying out its regulatory and enforcement functions. Accordingly, I am satisfied such information is exempt from release under section 33(1).
18. While I consider factual information concerning the property next to the Applicant's property is less sensitive, I have also decided its disclosure would be unreasonable for the following reasons:
- (a) the purpose of the Applicant's request appears to be primarily to access the name/s of the parties;
  - (b) there is conflict between the parties and the Applicant; and
  - (c) I can see no further utility in the release of their names in this instance.
19. In relation to information relating to the third party business details and the general nature of the proposed action to be taken by the Agency in Documents 1 and 2, I do not consider this information constitutes the personal affairs information of a third party and is not exempt from release under section 33(1).

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<sup>11</sup> Section 33(2B).

<sup>12</sup> Section 33(2C).

<sup>13</sup> Section 33(2A).

20. In addition, I am satisfied the disclosure of information that may reasonably be discerned by the Applicant or is already known by them given their proximity to the matter, would not be unreasonable in the circumstances.

21. The Schedule of Documents in **Annexure 1** outlines my decision in relation to section 33(1).

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

22. 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.

23. Determining what is ‘practicable’ requires consideration of the effort and editing involved in making the deletions ‘from a resources point of view’<sup>14</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>15</sup>

24. Given the Agency decision granted access to Document 2 in part, I consider it remains practicable to provide the Applicant with an edited copy of this document with exempt information deleted in accordance with section 25.

25. I have considered the effect of deleting exempt information from Document 1. In my view, it is not practicable for the Agency to delete the exempt information, because to delete the exempt information would render the document meaningless.

### **Conclusion**

26. While I am satisfied certain information is exempt from release under section 33(1) in Document 1, I am not satisfied the information to which the Agency refused access under section 33(1) in Document 2 is exempt from release.

27. As I am satisfied it is practicable to provide the Applicant with an edited copy of Document 1 with exempt information deleted in accordance with section 25, access to this document is granted in part.

28. The Schedule of Documents in **Annexure 1** sets out my decision in relation to each document and the Agency has been provided with a marked-up copy of the documents indicating information to be released to the Applicant.

### **Review rights**

29. 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>16</sup>

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<sup>14</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>15</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] and [155].

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

30. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.<sup>17</sup>
31. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.<sup>18</sup>
32. 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.
33. 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>19</sup>

***Third party review rights***

34. As I have determined to release documents that contain the personal affairs information of persons other than the Applicant and, 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.<sup>20</sup>
35. In this case, 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 on the date of decision.

***When this decision takes effect***

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

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<sup>17</sup> Section 52(5).

<sup>18</sup> Section 52(9).

<sup>19</sup> Sections 50(3F) and 50(3FA).

<sup>20</sup> Sections 49P(5), 50(3) 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]	Engineers report in relation to [address] – by [company]	4	Refused in full Section 33(1)	Release in part Sections 33(1), 25  The document is to be released in accordance with the marked-up copy provided to the Agency.	Section 33(1): I am satisfied the disclosure of certain personal affairs information would be unreasonable in the circumstances, 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 this document with exempt and/or irrelevant information deleted in accordance with section 25.
2.	[date]	Engineers report in relation to [address] by [company]	3	Refused in part Section 33(1)	Release in full	Section 33(1): I am satisfied the information to which the Agency refused access is not personal affairs information for the purpose of section 33 for the reasons outlined in the Notice of Decision above.