

## Notice of Decision and Reasons for Decision

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Applicant:	'FO2'
Agency:	Victorian WorkCover Authority
Decision date:	1 March 2024
Sections considered:	Sections 33(1), 35(1)(b)
Citation:	'FO2' and Victorian WorkCover Authority ( <i>Freedom of Information</i> ) [2024] VICmr 15 (1 March 2024)

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FREEDOM OF INFORMATION – safety complaint – information provided by the Applicant – provided in confidence – personal affairs information – unreasonable to release

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), I am not satisfied information to which the Agency refused access under sections 33(1) and 35(1)(b) is exempt from release.

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

A marked-up copy of the documents showing exempt or irrelevant information in accordance with my decision has been provided to the Agency.

My reasons for decision follow.

Please refer to pages 7-8 for information about further review rights through the Victorian Civil and Administrative Tribunal.

Sean Morrison  
Information Commissioner  
1 March 2024

## Reasons for Decision

### Background to review

1. The Applicant made a request to the Agency seeking access to [all documents relating to the Applicant's complaint about a specified property and about the Agency's engagement with the Applicant and others about an alleged safety issue at the property].

[Full request terms and contextual information redacted]

2. The Agency identified 16 documents falling within the terms of the Applicant's request and granted access to two documents in full and twelve documents in part, and refused access to four documents in full under sections 33(1) and 35(1)(b). 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 35(1)(b) – Information obtained in confidence*

9. A document is exempt under section 35(1)(b) 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) 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.
10. Section 35(2) provides that this section does not apply to information—

- (a) acquired by an agency or a Minister from a business, commercial or financial undertaking; and
- (b) that relates to trade secrets or other matters of a business, commercial or financial nature.

*Was the information obtained in confidence?*

11. Whether information communicated by an individual to an agency was communicated in confidence is a question of fact.<sup>1</sup>
12. 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.<sup>2</sup>
13. The information consists of information provided to the Agency by the Applicant, internal notes and advice circulated between Agency officers, and information provided to the Agency by another third party Agency.
14. With regard to the information acquired by the third party Agency, I accept the information was provided to the Agency with an expectation of confidentiality.
15. Having considered the information exchanged between the Agency officers in response to the Applicant's query, I accept there is a public interest in Agency officers being able to freely communicate their professional opinions and rationale so as to ensure that decisions made are subject to proper and thorough deliberation.
16. However, section 35(1)(b) generally applies only to information communicated to an agency from an outside source, rather than from an officer within an agency. Though, the Victorian Civil and Administrative Tribunal (VCAT) has accepted in certain circumstances, that section 35(1)(b) may apply to confidential information communicated to an agency by its own officers, such matters are generally limited to internal relations of an agency, for example, issues of employment or information reported to a superior officer through an official channel, or confidential communications between different parts of an agency.
17. Having considered the content and context of the information in the documents, which concern referrals and recommendations circulated to other Agency officers regarding an alert made by the Applicant, I am not satisfied the internal Agency communications contain information that was communicated to the Agency by its own officers in confidence as contemplated by section 35(1)(b).
18. Rather, the information was communicated within the Agency during the ordinary course of its business, specifically, in responding to requests by members of the public.

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

19. Section 35(1)(b) also requires I consider whether the Agency would be impaired from obtaining similar information in the future if the information were to be disclosed under the FOI Act. This involves considering whether others in the position of the communicator would be reasonably

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<sup>1</sup> *Ryder v Booth* [1985] VR 869 at [883]; *XYZ v Victoria Police* [2010] VCAT 255 at [264].

<sup>2</sup> *XYZ v Victoria Police* [2010] VCAT 255 at [265], referring to *Barling v Medical Board of Victoria* (1992) 5 VAR 542, 561-562.

likely to be inhibited or deterred from providing similar information to the Agency in the future should the information be disclosed.

20. The public interest test in section 35(1)(b) is narrow, in that it is directed toward the impact release would have on an agency's ability to obtain the same type of information in the future. I note the exemption will not be made out of an agency's impairment goes no further than showing potential communicators of the information may be less candid than they would otherwise have been.<sup>3</sup>
21. I accept the Agency relies on information and complaints from members of the public to carry out its regulatory functions, and that such persons generally make complaints with an expectation it will remain confidential to other third parties. I note that the Applicant was the notifier in this instance.
22. I am not satisfied that disclosure in this instance would inhibit the Agency from obtaining information of this nature in future for the following reasons:
  - (a) the information exempted by the Agency is primarily information provided by the Applicant to the Agency concerning an alleged safety issue;
  - (b) I consider third party agencies will not be inhibited or deterred from providing similar information to the Agency in the future should the information be disclosed in this instance;
  - (c) disclosure will not dissuade members of the public from making complaints where they make a complaint and consider action should be taken by the Agency in accordance with its regulatory functions;
  - (d) the views of the Agency officers were made in response to the Applicant's complaint, and were made during the course of their normal duties as Council officers with the interest to protect its community; and
  - (e) I consider that members of the public will continue to alert the relevant authorities when it concerns unsafe working practices. Similarly, I consider agency officers will continue to consult with the government on issues they are concerned with, irrespective of disclosure in this instance.
23. Accordingly, I am not satisfied the information in the documents subject to review is exempt from release under section 35(1)(b).
24. The Schedule of Documents in **Annexure 1** outlines my decision in relation to section 35(1)(b).

***Section 33(1)– Documents affecting personal privacy of third parties***

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

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<sup>3</sup> *Smeaton v Victorian WorkCover Authority* [2012] VCAT 1549 at [69], approving *Birnbauer v Inner and Eastern Health Care Network* [1999] 16 VAR 9.

- (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>4</sup> and
- (b) such disclosure would be ‘unreasonable’.

*Do the documents contain personal affairs information of individuals other than the Applicant?*

- 26. 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 this may be reasonably determined.<sup>5</sup>
- 27. 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>6</sup>
- 28. The documents contain the names, pronouns, email addresses, phone numbers, licence details, position descriptions and signatures of people other than the Applicant. The documents also include images of third parties by way of photographs.

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

- 29. The concept of ‘unreasonable disclosure’ involves balancing the public interest in the disclosure of official information with the personal interest in privacy in the particular circumstances of a matter.
- 30. In *Victoria Police v Marke*,<sup>7</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>8</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>9</sup>
- 31. 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;
  - (b) the circumstances in which the information was obtained;
  - (c) the Applicant’s interest in the information;

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<sup>4</sup> Sections 33(1) and 33(2).

<sup>5</sup> Section 33(9).

<sup>6</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>7</sup> [2008] VSCA 218 at [76].

<sup>8</sup> *Ibid.*

<sup>9</sup> *Ibid* at [79].

- (d) whether any public interest would be promoted by release of the personal affairs information;
  - (e) the likelihood of disclosure of information, if released;
  - (f) whether the individuals to whom the information relates object, or would be likely to object, to the release of the information;
  - (g) whether disclosure of the information would or would be reasonably likely to endanger the life or physical safety of any person.<sup>10</sup>
32. I am satisfied disclosure of the personal affairs information of Agency officers who were a part of the decision-making process, or had direct contact with the Applicant during the course of their complaint, being names, email addresses and direct telephone numbers, would not be unreasonable for the following reasons:
- a) in most of the documents, the Applicant is a party to these communications and either provided the information to the Agency or was provided the information during the course of the complaint;
  - b) the information primarily concerns decision-making and complaint processing in response to the Applicant's complaint; and
  - c) the information is not particularly sensitive and was created during the course of the Agency officer's usual employment duties.
33. I am, however, satisfied the disclosure of some personal affairs information of third parties, administrative staff, signatures and direct phone numbers would be unreasonable for the following reasons:
- a) generally, the direct contact details of an agency officer are not made widely available;
  - b) there is no public interest in disclosing the direct contact details where the name of a relevant third party has already been released;
  - c) having considered the broad implications regarding disclosure of third parties in this case I am not satisfied the Applicant's interest is outweighed by the public interest in ensuring the privacy of individuals who assist the Agency during their enquiries is maintained;
  - d) I do not consider disclosure of this personal information relating to third parties and agency officers peripheral to the matter would assist the Applicant.
  - e) I also consider that, given the nature of the work performed by the Agency and the local community context in which the Agency operates, the sensitivity surrounding disclosure of the personal affairs information of people subject to the Agency's enquiries is heightened.
34. Accordingly, I have determined to release the personal affairs information concerning the Applicant and the responsible Agency officers who communicated with the Applicant during

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<sup>10</sup> Section 33(2A).

the course of their complaint. However, I have determined the remaining personal affairs information is exempt from release under section 33(1).

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

35. 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.
36. Determining what is ‘practicable’ requires consideration of the effort and editing involved in making the deletions ‘from a resources point of view’<sup>11</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>12</sup>
37. I have considered the effect of deleting exempt information from the documents. In my view, it is practicable for the Agency to delete the exempt information, because it would not require substantial time and effort, and the edited documents would retain meaning.

### **Conclusion**

38. On the information before me, I am not satisfied certain information in the documents is exempt from release under sections 33(1) and 35(1)(b).
39. As I am satisfied it is practicable to provide the Applicant with an edited copy of the documents with exempt information deleted in accordance with section 25, access is granted in part.
40. A marked-up copy of the documents indicating exempt or irrelevant information in accordance with my decision has been provided to the Agency.

### **Timeframe to seek a review of my decision**

41. If either party to this review is not satisfied with my decision, they are entitled to apply to the VCAT for it to be reviewed.<sup>13</sup>
42. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.<sup>14</sup>
43. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.<sup>15</sup>
44. 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.

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<sup>11</sup> *Mickelburgh 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>12</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>13</sup> The Applicant in section 50(1)(b) and the Agency in section 50(3D).

<sup>14</sup> Section 52(5).

<sup>15</sup> Section 52(9).

45. 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>16</sup>

#### **Third party review rights**

46. As I have determined to release documents that contain the personal affairs information of persons other than the Applicant and documents claimed exempt under section 35(1)(b), 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>17</sup>
47. In the circumstances, I have decided it is practicable to notify the relevant third parties and they will be notified of my decision and the right to apply to VCAT for a review of my decision within 60 days from the date of my decision.

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

48. This decision does not take effect until the third party's 60 day review period expires.

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<sup>16</sup> Sections 50(3F) and 50(3FA).

<sup>17</sup> Sections 49P(5), 50(3) [for personal affairs information], 50(3AB) [for section 35(1)(b) information] 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]	Inspection Report – [reference number]	7	Released in part 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 it would be unreasonable to disclose the personal affairs information of third parties in this document for the reasons outlined in the Notice of Decision, above. However, I am not satisfied it would be unreasonable to release the personal affairs information of the Agency Officer who have direct involvement with the Applicant during the course of the complaint 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 information deleted in accordance with section 25.
2	[Date]	Inspection Report – [reference number]	5	Released in part Section 33(1)	Release in part Sections 33(1), 25 The document is to be released in accordance with	See comments for Document 1 above.

Document No.	Date of document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
					the marked-up copy provided to the Agency.	
3	[Date]	Improvement Notice – [reference number]	3	Released in part 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): See comments for Document 1 above.
4	[Date]	Virtual Enquiries Record – [reference number]	2	Released in part 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): See comments for Document 1 above.
5	[Date]	Inspector handwritten notes	2	Released in part Section 33(1)	Release in full	Section 35(1)(b): I am not satisfied the relevant information is exempt from release under section 35(1)(b) for the

Document No.	Date of document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
						reasons outlined in the Notice of Decision above. Section 33(1): See comments for Document 1 above.
6	[Date]	Health and Safety Concern	11	Released in part 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): See comments for Document 1 above.
7	[Date]	Health and Safety Concern	7	Released in part 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): See comments for Document 1 above. Section 35(1)(b): See comments for Document 5 above.
8	[Date]	Inspector handwritten notes	4	Released in part Section 33(1)	Release in part Sections 33(1), 25	Section 33(1): See comments for Document 1 above.

Document No.	Date of document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
					The document is to be released in accordance with the marked-up copy provided to the Agency.	
9	[Date]	Inspector handwritten notes	4	Released in part 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): See comments for Document 1 above.
10	[Date]	Complaints Tracking Record	5	Released in part 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): See comments for Document 1 above.
11	[Date]	Email correspondence between FOI	2	Released in part	Release in part	Section 33(1): See comments for Document 1 above.

Document No.	Date of document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
		Applicant and WorkSafe		Section 33(1)	Sections 33(1), 25 The document is to be released in accordance with the marked-up copy provided to the Agency.	
12	[Date]	Email correspondence with attachments	7	Refused in full Section 35(1)(b)	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): See comments for Document 1 above.
13	[Date]	Notes – Virtual Inspection	2	Released in part Sections 33(1) and 35(1)(b)	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): See comments for Document 1 above. Section 35(1)(b): See comments for Document 5 above.
14	[Date]		4	Released in full	Not subject to review	

Document No.	Date of document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
		Photographs				
15	[Date]	Email correspondence	3	Refused in full Sections 35(1)(b) and 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): See comments for Document 1 above. Section 35(1)(b): See comments for Document 5 above.
16	Various	Audio recordings	11	Released in full	Not subject to review	