

Notice of Decision and Reasons for Decision

Applicant:	'FB3'
Agency:	Environment Protection Authority
Decision date:	28 March 2023
Exemption considered:	Sections 35(1)(b), 33(1)
Citation:	'FB3' and Environment Protection Agency (Freedom of Information) [2023] VICmr 20 (28 March 2023)

FREEDOM OF INFORMATION – correspondence – noise complaint – confidential information – information acquired by agency – correspondence from third parties with agency – personal affairs information

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 in that I have decided to release additional information where I am satisfied it is not exempt from release under section 35(1)(b).

I am satisfied personal affairs information and other information to which the Applicant does not seek access is irrelevant to the terms of the Applicant's review application for the purposes of section 25.

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

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
28 March 2023

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency for access to certain documents.
2. Following consultation with the Agency, the Applicant clarified the terms of their request as follows:
 1. Community reports relating to unreasonable noise from [third party business] from [date] to current date.
 2. An Acoustic report and a noise monitoring program report provided to [the Agency] by [third party business] relating to [third party business] operations.
3. The Agency identified 23 documents falling within the terms of the Applicant's request and granted access to 18 documents in full and refused access to five documents in part under section 35(1)(b). The Agency's decision letter sets out the reasons for its decision.

Review application

4. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
5. The Applicant indicated they do not seek access to personal affairs information such as names or contact details. Accordingly, this information deleted by the Agency will remain deleted in accordance with section 25.
6. During the review, the Applicant clarified that they are seeking 'descriptive data, what it sounds like, how often it occurs'...'I confirm that I seek access to descriptive data and numerical data please, contained within all redacted community complaints'.
7. I have examined a copy of the documents subject to review.
8. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
9. I have considered all communications and submissions received from the parties.
10. 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.
11. 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.
12. 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.

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

Section 35(1)(b) – Information obtained in confidence by an agency

13. 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.
14. Confidentiality can be expressed or implied from the circumstances of the matter.²
15. The documents subject to review form part of the Agency's regulatory functions under the *Environment Protection Act 2017* (Vic) in relation to noise complaints. They include emails written by a third party to the Agency that relate to a noise complaint about another third party.
16. Based on the context and content of the documents, I am satisfied information in the documents was communicated to the Agency by a third party with an expectation it would remain confidential.
17. Accordingly, I am satisfied the first requirement for section 35(1)(b) is met.

Would disclosure 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?

18. Section 35(1)(b) also requires consideration of whether the Agency would be impaired from obtaining similar information in the future if the documents were to be disclosed under the FOI Act.
19. This means I must be satisfied others in the position of the communicator would be reasonably likely not to provide similar information to the Agency in the future if the information were to be disclosed.
20. The exemption under section 35(1)(b) will not be made out if the evidence goes no further than the people involved would be somewhat less candid than they otherwise might be in providing information in the future.³
21. The Agency's statutory functions include administering and ensuring compliance with certain environment protection legislation and associated laws and regulations. In the circumstances, these functions include receiving complaints in relation to noise and investigating such complaints.
22. 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. The exemption does not permit me to have regard to other matters, such as any public interest in favour of release, or the extent to which the Applicant's personal interest in the document would be served by granting access to the document.
23. In its decision letter, the Agency submits:

The documents exempted under this provision are pollution reports, made to EPA in confidence, and are of a kind that EPA relies upon to carry out certain its statutory functions. If potential reporters thought that EPA would disclose their confidential communications, they would be reasonably likely to refrain from making them, which would deprive EPA of information on which it relies to give proper effect to its role in administering the law and particularly the *Environment Protection Act 2017*. Such a result would be contrary to the public interest.

² *XYZ v Victoria Police* [2010] VCAT 255 at [265].

³ *Smeaton v Victorian WorkCover Authority* [2012] VCAT 1549 approving *Birnbauer v Inner and Eastern Health Care Network* (1999) 16 VAR 9.

24. I accept the Agency relies on information and complaints from members of the public to carry out its regulatory functions under the EPA Act, and that such persons generally make complaints with an expectation it will remain confidential.
25. In my view, disclosure of certain information provided to the Agency and recorded in the documents would not be reasonably likely to impair the Agency from obtaining similar information in the future, for the following reasons:
 - (a) all identifying information has been removed from the documents, and I do not consider the complainant/s could be identified from the remaining information;
 - (b) disclosure will not dissuade members of the public from making noise complaints where they consider action should be taken by the Agency in accordance with its regulatory functions under the EPA Act; and
 - (c) the documents in this particular matter are distinguishable from other matters, for example where an agency is investigating a complaint and seeking members of the community to voluntarily provide information to it.
26. Accordingly, I am not satisfied the information in the documents subject to review is exempt from release under section 35(1)(b).
27. The Schedule of Documents at **Annexure 1** contains a summary of my decision with respect to each document.
28. As I have determined section 35(1)(b) does not apply to the information in the documents, for completeness I also consider the application of section 33(1) in relation to the same information.

Section 33(1) – Personal affairs information

29. A document is exempt under section 33(1) if two conditions are satisfied:
 - (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**);⁴ and
 - (b) such disclosure would be ‘unreasonable’.
30. 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.
31. The concept of ‘unreasonable disclosure’ involves balancing the public interest in the disclosure of official information with the interest in protecting the personal privacy of a third party in the particular circumstances of a matter.
32. Section 33(9) makes it clear that information relating to the ‘personal affairs’ of a person includes information that identifies any person or discloses their address or location or from which such information can be reasonably determined.⁵
33. The definition of ‘personal affairs information’ also extends to information from which a person’s identity could be discerned. From my review of the information provided by the member of the public, such information could reasonably be used by the Applicant to identify that person.

⁴ Sections 33(1) and 33(2).

⁵ Section 33(9).

34. Documents 2 and 12 contain information that could reasonably be discerned and used to identify a third party.
35. The documents are emails sent to the Agency containing descriptions of noise complaints, as well as brief sections of personal information. Given the Applicant's request, I consider they do not seek access to this information. Accordingly, I have determined certain information in Documents 2 and 12 amounts to personal affairs information that is not sought by the Applicant and is therefore irrelevant information for the purposes of section 25, which is discussed below.
36. The Schedule of Documents at **Annexure 1** contains a summary of my decision with respect to each document.

Section 25 – Deletion of exempt or irrelevant information

37. 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.
38. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'⁶ 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 25.⁷
39. As noted above at paragraph 6, the Applicant does not seek access to the names and contact details of third parties or other personal affairs information. Further, they specifically seek access to descriptive data and numerical data please, contained within all redacted community complaints'.
40. Based on this refined terms, I have determined that personal affairs information and other information provided by the complainant that falls these terms is irrelevant and is to remain deleted in accordance with section 25.
41. As I am satisfied it is practicable to provide the Applicant with an edited copy of the document with irrelevant information deleted in accordance with section 25, access to the documents is granted in part.

Conclusion

42. On the information before me, I am not satisfied certain information in the documents is exempt from release under section 35(1)(b). However, I have determined other information is irrelevant to the terms of the Applicant's review application for the purposes of section 25.
43. As I am satisfied it is practicable to provide the Applicant with an edited copy of the documents with exempt and irrelevant information deleted in accordance with section 25, access to the documents is granted in part.
44. The Schedule of Documents in **Annexure 1** sets out my decision in relation to each document.

Review rights

45. 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.⁸

⁶ *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].

⁷ *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].

⁸ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

46. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.⁹
47. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹⁰
48. 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.
49. 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.¹¹

When this decision takes effect

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

⁹ Section 52(5).

¹⁰ Section 52(9).

¹¹ Sections 50(3F) and 50(3FA).

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
1.	[date]	Acoustic Report	31	Released in full	Not subject to review	
2.	[date]	Email correspondence between Agency officer and third party	3	Released in part Section 35(1)(b)	Release in part Sections 25 The document is to be released with irrelevant information deleted in accordance with section 25.	Section 35(1)(b): I am not satisfied the document is exempt from release under section 35(1)(b) for the reasons outlined in the Notice of Decision above. Section 25: I am satisfied certain information in the documents is personal affairs information, which is not sought by the Applicant. Therefore, this information is irrelevant information for the purpose of section 25 and is to remain deleted.
3.	[date]	Agency file notes	2	Released in full	Not subject to review	
4.	[date]	Agency file notes	3	Released in full	Not subject to review	
5.	[date]	Agency file notes	1	Released in full	Not subject to review	
6.	[date]	Agency file notes	3	Released in full	Not subject to review	
7.	[date]	Agency file notes	1	Released in full	Not subject to review	
8.	[date]	Agency file notes	2	Released in full	Not subject to review	

Document No.	Date of Document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
9.	[date]	Email correspondence from agency officer to third party	3	Released in full	Not subject to review	
10.	[date]	Email correspondence from Agency officer to third party	1	Released in full	Not subject to review	
11.	[date]	[third party] Noise Monitoring Program	19	Released in full	Not subject to review	
12.	[date]	Industrial noise complaint	1	Released in part Section 35(1)(b)	Release in part Section 25 The document is to be released with irrelevant information deleted in accordance with section 25.	Section 35(1)(b): See comments for Document 2. Section 25: See comments for Document 2
13.	[date]	Third party noise complaint	2	Released in part Section 35(1)(b)	Release in part Section 25 The document is to be released with irrelevant information deleted in accordance with section 25.	Section 35(1)(b): See comments for Document 2. Section 25: See comments for Document 2
14.	[date]	Email correspondence between Agency officer and third party	3	Released in part Section 35(1)(b)	Release in part Section 25 The document is to be released with irrelevant	Section 35(1)(b): See comments for Document 2. Section 25: See comments for Document 2

Document No.	Date of Document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
					information deleted in accordance with section 25.	
15.	[date]	Email correspondence between Agency officer and third party	4	Released in full	Not subject to review	
16.	[date]	Email correspondence between Agency officer and third party		Released in full	Not subject to review	
17.	[date]	Email correspondence between Agency officer and third party	4	Released in part Section 35(1)(b)	Release in part Section 25 The document is to be released with irrelevant information deleted in accordance with section 25.	Section 35(1)(b): See comments for Document 2. Section 25: See comments for Document 2.
18.	[date]	Email correspondence between Agency officer and third party	1	Released in full	Not subject to review	
19.	[date]	Email correspondence between Agency officer and third party	2	Released in full	Not subject to review	
20.	[date]	Email correspondence between Agency officer and third party	2	Released in full	Not subject to review	

Document No.	Date of Document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
21.	[date]	Email correspondence between Agency officer and third party	1	Released in full	Not subject to review	
22.	[date]	Email correspondence between Agency officer and third party	1	Released in full	Not subject to review	
23.	[date]	Low frequency noise and vibration complaint and request for another assessment	3	Released in full	Not subject to review	