

Notice of Decision and Reasons for Decision

Applicant:	'FI6'
Agency:	City of Port Phillip
Decision date:	21 August 2023
Exemptions and provisions considered:	Sections 33(1), 35(1)(b), 25
Citation:	'FI6' and City of Port Phillip (Freedom of Information) [2023] VICmr 86 (21 August 2023)

FREEDOM OF INFORMATION – local government – council – complaint – personal affairs information – unreasonable disclosure – information obtained in confidence

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.

My decision on the Applicant's request is the same as the Agency's decision.

I am satisfied certain information in the documents is exempt from release under sections 33(1) and 35(1)(b).

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

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner

21 August 2023

Reasons for Decision

Background to review

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

May I please have a copy of all complaints made to [the Agency] against the [business name], [address], from [date range]? I would also like to acquire any supporting evidence the complainant(s) may have submitted. Moreover, if I could acquire the complainant's details that would be wonderful. I ask because [description] has threatened the safety of our staff. We are simply trying to protect our staff as well as our patrons. I require as much detail pertaining to the complaints as possible as we will have our lawyers review each complaint for its merit.

2. The Agency identified one document falling within the terms of the Applicant's request and granted access to it in part, exempting certain information 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 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 33(1) – Documents affecting personal privacy of third parties

9. A document is exempt from release 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**);¹ and

¹ Sections 33(1) and 33(2).

(b) such disclosure would be 'unreasonable'.

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

10. 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.²
11. A document will disclose a third party's personal affairs information if it is capable, either directly or indirectly, of identifying that person.³ 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.
12. Even where an applicant claims to know the identity of a third party, disclosure of their personal affairs information may still be unreasonable in the circumstances.⁴
13. I am satisfied the document contains the personal affairs information of third parties, being a name and other personal information about them.

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 the personal privacy of an individual in the particular circumstances.
15. In *Victoria Police v Marke*,⁵ 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'.⁶ 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'.⁷
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 more sensitive the information, the more likely its disclosure would be unreasonable, and conversely, the more innocuous the information, the less likely disclosure would be unreasonable.⁸

² Section 33(9).

³ *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].

⁴ *AB v Department of Education and Early Childhood Development* [2011] VCAT 1263 at [58]; *Akers v Victoria Police* [2003] VCAT 397 at [41].

⁵ [2008] VSCA 218 at [76].

⁶ *Ibid.*

⁷ *Ibid* at [79].

⁸ *Page v Metropolitan Transit Authority (1988)* 2 VAR 243.

The Agency refused access to the name and other identifying information of a person who made a complaint about the Applicant's property. The Agency received the information in connection with its regulatory and law enforcement functions.

I am of the view that most complaints made to a Council are made with either an express request for the complainant's identity to remain confidential or confidentiality around the complainant's identity is implied. In this context, I consider the information is sensitive in nature given it concerns a complaint made to a Council by a person about another person.

(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).⁹

The Applicant seeks access to the details of the person who made the complaint as they would like to mediate the issues in dispute and speak with them directly.

I acknowledge the Applicant's interest in obtaining access to the requested information. However, this factor must be weighed against other relevant factors in an attempt to reconcile two important, but competing, objectives: the public interest in disclosure of information and the interest in protecting a third party's personal privacy.

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

I accept there is a broad public interest in the disclosure of information where it would assist a person, subject to complaint allegations, understand the nature of a complaint made against them. However, I do not consider this equates to a complete right to access all information obtained by the Agency, required to adequately investigate and respond to complaints it receives.

In this case, the Agency released most of the information in the document except for certain information that would identify the person who made a complaint about the Applicant's property.

In these circumstances, I am not satisfied the Applicant's personal interest in the information is outweighed by the public interest in the Agency being able to carry out its statutory regulatory and law enforcement functions. In my view, the public interest weighs against disclosure of information provided to the Agency on a voluntary basis, as to do so, may mean members of the public are less likely to make complaints and provide information to the Council about issues of concern and that engage the Agency's regulatory and law enforcement functions. In many instances, I consider Councils rely on the voluntary provision of information or complaints from members of the community in order to be made aware of conduct in breach or possible breach of local laws and regulations (eg. building works, noise levels and the management of domestic animals).

⁹ *Victoria Police v Marke* [2008] VSCA 218 at [104].

I also consider maintaining the confidentiality around the identity of a complainant is in the public interest to assist the Agency in maintaining the trust of the community to keep sensitive and personal information confidential.

(d) The likelihood of disclosure of information, 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.¹⁰

I note the Applicant seeks the information to provide to their legal representatives, however there is no information before me to suggest any further dissemination of the information.

(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.¹¹

The Agency advised it consulted with the relevant third party in relation of the release of their personal affairs information. The third party objected to the disclosure of their personal affairs information. Given the context in which the complainant engaged with the Agency (ie. making a complaint against the Applicant's property), I have given significant weight to the views of the third party and their personal right to privacy.

(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.¹² 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 the third party's personal affairs information, to which the Agency refused access, would be unreasonable and is exempt from release under section 33(1).

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

18. A document is exempt from release under section 35(1)(b) if two conditions are satisfied:

¹⁰ *Victoria Police v Marke* [2008] VSCA 218 at [104] at [68].

¹¹ Section 33(2B).

¹² Section 33(2A).

- (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.

Was the information obtained in confidence?

- 19. Whether information communicated by an individual to an agency was communicated in confidence is a question of fact.¹³
- 20. In doing so, 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.¹⁴
- 21. I am satisfied the information was communicated to the Agency in circumstances in which confidentiality could reasonably be implied, based on the nature and context of the information.

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

- 22. 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 likely to be inhibited or deterred from providing similar information to the Agency in the future should the information be disclosed.
- 23. 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.¹⁵
- 24. In its submission dated [date], the Agency states:

...The release of complaints made to Council would seriously impeded Council's ability to obtain such information in the future. It is important that Council is able to maintain confidentiality around complaints received and indeed the identity of the complainants in order to not deter members of the community from lodging a complaint when there is a need to do so...
- 25. The Agency's statutory functions require it to administer and ensure compliance with certain legislation and local laws and regulations. As such, it has regulatory and law enforcement functions. Complaints made by a person about another person and made to the Agency will, by their very nature and context, will generally be sensitive and confidential in nature. Particularly where such complaints concern a local issue or dispute within a small or particular sector of the community.

¹³ *Ryder v Booth* [1985] VR 869 at [883]; *XYZ v Victoria Police* [2010] VCAT 255 at [264].

¹⁴ *XYZ v Victoria Police* [2010] VCAT 255 at [265].

¹⁵ *Smeaton v Victorian WorkCover Authority* [2012] VCAT 1549 at [69], approving *Birnbauer v Inner and Eastern Health Care Network* [1999] 16 VAR 9.

26. If details of complaints and complainants made to Councils were to be routinely released under FOI, I am of the view community members would be deterred from making complaints to the Agency. This impairment goes beyond trifling or minimal impairment¹⁶ as it would reasonably be likely to detrimentally impact upon the Agency's ability to receive and investigate complaints and thereby inhibit its ability to effectively carry out its regulatory and law enforcement functions.
27. Accordingly, I am satisfied the disclosure of certain information provided in confidence to the Agency would be contrary to the public interest and is exempt from release under section 35(1)(b).

Section 25 – Deletion of exempt or irrelevant information

28. 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.
29. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'¹⁷ 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 25.¹⁸
30. Given my decision is the same as the Agency's decision and it granted access to the documents in part in accordance with section 25, it remains practicable to provide the Applicant with an edited copy of the document with exempt information deleted.

Conclusion

31. On the information before me, I am satisfied certain information in the documents is exempt from release under sections 33(1) and 35(1)(b).
32. As I am satisfied it remains practicable to provide the Applicant with an edited copy of the document with exempt information deleted in accordance with section 25, I have determined to grant access to the document in part.

Review rights

33. 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.¹⁹

¹⁶ *Ryder v Booth* [1985] VR 869.

¹⁷ *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].

¹⁸ *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].

¹⁹ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

34. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.²⁰
35. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.²¹
36. 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.
37. 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.²²

²⁰ Section 52(5).

²¹ Section 52(9).

²² Sections 50(3F) and 50(3FA).