

Notice of Decision and Reasons for Decision

Applicant:	'FK4'
Agency:	Alpine Shire Council
Decision date:	30 November 2023
Sections considered:	Sections 31(1)(a), 32(1), 33(1), 35(1)(b)
Citation:	'FK4' and Alpine Shire Council (Freedom of Information) [2023] VICmr 98 (30 November 2023)

FREEDOM OF INFORMATION – Council documents – planning documents – statutory declarations – legal advice – personal affairs information – unreasonable to disclose – legal professional privilege

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 is the same as the Agency's decision.

I am satisfied Documents 1-5 are exempt from release under section 33(1) and Document 6 is exempt from release under section 32(1).

As I am satisfied it is not 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 refuse access to the documents in full.

The Schedule of Documents in **Annexure 1** sets out my decision in relation to each document.

My reasons for decision follow.

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

Shantelle Ryan
Acting Public Access Deputy Commissioner

30 November 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 initial request and sought access to:

I am looking for any and all information about the application for and the granting of existing use rights for [named address], regardless of the applicant, although I think it was [entity], any emails, messages, notes to do with this topic including all evidence provided to obtain [existing use rights] for [named address] from dates [date range].
2. The Agency provided notification to the Applicant under section 25A(6), inviting them to amend the scope as to process the request in its above form would substantially divert the resources of the Agency from its other operations.
3. After discussions with the Agency, the Applicant narrowed their request and sought access to:
 - 1) [Various] statutory declarations provided as evidence by [third party], in support of their client's application under section 97N of the *Planning and Environment Act 1987*, for a certificate of compliance to state that an existing use complies with the requirements of the planning scheme
 - 2) Legal advice prepared by Council's external lawyers [legal practitioners] [date]

... and the other documents such as diaries of bookings for meals and of events held there, anything [third party] provided.
4. The Agency identified six documents falling within the terms of the Applicant's request and refused access to the documents in full under sections 31(1)(a), 32(1), 33(1) and 35(1)(b). The Agency's decision letter sets out the reasons for its decision.

Review application

5. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
6. The Applicant did not agree with the Agency's fresh decision and, as required by section 49MA(2), I proceeded with my review on the basis of the fresh decision.
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.

Review of exemptions

12. In response to point 1 of the Applicant's request, the Agency identified five statutory declaration documents (**Documents 1-5**). The Agency refused access to these documents in full, claiming sections 31(1)(a), 33(1) and 35(1)(b).

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

13. 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**);¹ and
 - (b) such disclosure would be 'unreasonable'.

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

14. 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.²
15. 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.³
16. 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
17. I am satisfied Documents 1-5 are inherently the personal affairs of persons other than the Applicant, as the documents were created by third parties in order to outline experiences and timelines of matters relevant to their business for the purpose of providing to the Agency. The statutory declaration documents are detailed documents that also contain third-party evidence relevant to the permit matter.

¹ Sections 33(1) and 33(2).

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].

Would disclosure of the personal affairs information be unreasonable?

18. 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.
19. 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
20. 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 are five statutory declarations made by third parties to the Agency. The information was collected by the Agency in the course of carrying out its regulatory and enforcement functions in relation to managing permit matters in its local government area.

I note the Applicant [circumstances]. 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.⁸

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 third parties would not expect their personal affairs information would be disclosed by the Agency under the FOI Act.

(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

⁵ [2008] VSCA 218 at [76].

⁶ *Ibid.*

⁷ *Ibid* at [79].

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

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

I understand the Applicant seeks access to the information on the basis they are of the view there is an issue with the granting of a permit to this particular business.

(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 a [related] property, 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 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

Accordingly, I have considered the likelihood of the personal affairs information in the document being further disseminated, if disclosed, and the effects broader disclosure of this information would have on the privacy of the relevant third parties.

There is no information before me that indicates the information will be further disseminated.

(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 (or their next of kin, if deceased) 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 However, this obligation does not arise if:

- (a) the notification would be reasonably likely to endanger the life or physical safety of a person, or cause them undue distress, or is otherwise unreasonable in the circumstances;
- (b) the notification would be reasonably likely to increase the risk to the safety of a person experiencing family violence; or
- (c) it is not practicable to do so.¹²

¹⁰ Ibid at [68].

¹¹ Section 33(2B).

¹² Section 33(2C).

The Agency advised it has consulted with third parties, and I have taken these responses to consultation into consideration.

- (f) Whether disclosure of the information would or would be reasonably likely to endanger the life or physical safety of any person¹³

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.¹⁴

I have taken this factor into consideration.

21. Having regard to the above factors, I am satisfied disclosure of the 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 the information in the statutory declaration documents is exempt from release under section 33(1).
22. As I am satisfied the statutory declaration documents are exempt from release under section 33(1), it is not necessary for me to consider the application of sections 31(1)(a) and 35(1)(b) to the same information.
23. The Schedule of Documents in **Annexure 1** outlines my decision in relation to section 33(1).

Section 32(1) – Documents affecting legal proceedings

24. In response to point 2 of the Applicant's request, the Agency identified one document, Document 6, and applied section 32(1) to it in full.
25. Section 32(1) provides a document is an exempt document 'if it is of such a nature that it would be privileged from production in legal proceedings on the ground of legal professional privilege or client legal privilege'.
26. A document will be subject to legal professional privilege and exempt under section 32(1) where it contains a confidential communication:¹⁵
 - (a) between the client (or the client's agent) and the client's professional legal advisers, that was made for the dominant purpose of obtaining or providing legal advice or is referable to pending or contemplated litigation; or
 - (b) between the client's professional legal advisers and third parties, that was made for the dominant purpose of pending or contemplated litigation; or

¹³ Section 33(2A).

¹⁴ Section 33(2A).

¹⁵ *Graze v Commissioner of State Revenue* [2013] VCAT 869 at [29]; *Elder v Worksafe Victoria* [2011] VCAT 1029 at [22]. See also *Evidence Act 2008* (Vic), section 119.

(c) between the client (or the client's agent) and third parties that was made for the purpose of obtaining information to be submitted to the client's professional legal advisers for the dominant purpose of obtaining advice on pending or contemplated litigation.

27. The High Court of Australia has held the purpose of legal privilege ensures a client can openly and candidly discuss legal matters with their legal representative and seek legal advice:

The rationale of this head of privilege, according to traditional doctrine, is that it promotes the public interest because it assists and enhances the administration of justice by facilitating the representation of clients by legal advisers, the law being a complex and complicated discipline. This it does by keeping secret their communications, thereby inducing the client to retain the solicitor and seek his advice, and encouraging the client to make a full and frank disclosure of the relevant circumstances to the solicitor.¹⁶

28. I am satisfied the document is subject to legal privilege as it is a confidential communication between the Agency and its external lawyers made for the dominant purpose of obtaining and providing legal advice or are communications that disclose legal advice to which privilege attaches.

Has legal professional privilege been waived?

29. Legal privilege exists to protect the confidentiality of communications between a lawyer and a client. Privilege will be lost where the client has acted in a way that is inconsistent with the maintenance of that confidentiality – for instance where the substance of the information has been disclosed with the client's express or implied consent.¹⁷

30. Privilege will be lost where the client acts in a way that is inconsistent with the maintenance of that confidentiality – for instance where the substance of the information has been disclosed with the client's express or implied consent.¹⁸

31. I am not satisfied privilege has been waived in this circumstance.

32. Accordingly, I am satisfied Document 6 is exempt from release under section 32(1) and my decision is set out in the Schedule of Documents in **Annexure 1**.

Section 25 – Deletion of exempt or irrelevant information

33. 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.

34. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'¹⁹ and the effectiveness of the deletions.

¹⁶ *Grant v Downs* (1976) 135 CLR 674 at [685].

¹⁷ Sections 122(2) and (3) of the *Evidence Act 2008* (Vic) (for Client Legal Privilege) or *Mann v Carnell* (1999) 201 CLR 1 at [28-29] (for Legal Professional Privilege).

¹⁸ Sections 122(2) and 122(3) of the *Evidence Act 2008* (Vic) (for client legal privilege) or *Mann v Carnell* (1999) 201 CLR 1 at [28]-[29] (for legal professional privilege).

¹⁹ *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].

Where deletions would render a document meaningless, they are not 'practicable' and release of the document is not required under section 25.²⁰

35. I have considered the effect of deleting exempt information from the documents. In my view, it is not practicable for the Agency to delete the exempt information, because do so would render the documents meaningless. Access is therefore refused in full.

Conclusion

36. On the information before me, I am satisfied Documents 1-5 are exempt from release under sections 33(1) and Document 6 is exempt from release under section 32(1).
37. As I am satisfied it is not practicable to provide the Applicant with an edited copy of the documents with exempt information deleted in accordance with section 25, access is refused in full.

Timeframe to seek a review of my decision

38. 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.²¹
39. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.²²
40. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.²³
41. 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.
42. 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.²⁴

When this decision takes effect

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

²⁰ *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].

²¹ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

²² Section 52(5).

²³ Section 52(9).

²⁴ 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.	[year]	Third Party Statutory Declaration	103	<p>Refused in full</p> <p>Sections 31(1)(a), 33(1), 35(1)(b)</p>	<p>Refuse in full</p> <p>Sections 33(1), 25</p>	<p>Section 33(1): I am satisfied it would be unreasonable to disclose the personal affairs information in this document for the reasons outlined in the Notice of Decision, above.</p> <p>Section 31(1)(a): I have not considered the application of this section as I am satisfied the document is exempt in full under section 33(1).</p> <p>Section 35(1)(b): I have not considered the application of this section as I am satisfied the document is exempt in full under section 33(1).</p> <p>Section 25: I am satisfied it is not practicable to provide the Applicant with an edited copy of this document with exempt information deleted in accordance with section 25.</p>
2.	[year]	Third Party Statutory Declaration	2	<p>Refused in full</p> <p>Sections 31(1)(a), 33(1), 35(1)(b)</p>	<p>Refuse in full</p> <p>Sections 33(1), 25</p>	See comments for Document 1.

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Document No.	Date of document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
3.	[year]	Third Party Statutory Declaration	220	Refused in full Sections 31(1)(a), 33(1), 35(1)(b)	Refuse in full Sections 33(1), 25	See comments for Document 1.
4.	[year]	Third Party Statutory Declaration	6	Refused in full Sections 31(1)(a), 33(1), 35(1)(b)	Refuse in full Sections 33(1), 25	See comments for Document 1.
5.	[year]	Third Party Statutory Declaration	1	Refused in full Sections 31(1)(a), 33(1), 35(1)(b)	Refuse in full Sections 33(1), 25	See comments for Document 1.
6.	[year]	Legal Advice	10	Refused in full Section 32(1)	Refuse in full Section 32(1), 25	Section 32(1): I am satisfied the legal advice is exempt under section 32(1) for the reasons outlined above. Section 25: I am satisfied it is not practicable to provide the Applicant with an edited copy of this document with exempt information deleted in accordance with section 25.