

## Notice of Decision and Reasons for Decision

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Applicant:	'FQ1'
Agency:	Local Government Inspectorate
Decision date:	23 May 2024
Exemptions and provisions considered:	Sections 33(1), 35(1)(b)
Citation:	'FQ1' and Local Government Inspectorate (Freedom of Information) [2024] VICmr 32 (23 May 2024)

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FREEDOM OF INFORMATION – complaints – date of complaints – nature of complaints – information provided in confidence – unreasonable disclosure of third party 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 a document requested by the Applicant under the FOI Act.

My decision on the Applicant's request differs from the Agency's decision only in that I have determined certain information is irrelevant to the terms of the Applicant's request, rather than exempt from release. I am satisfied all other substantive content in the document is exempt from release under sections 33(1) and 35(1)(b).

I consider it is not practicable to provide the Applicant with an edited copy of the document and therefore access is refused in full. The effect of my decision is the same and no further information is to be released.

Please refer to the end of this decision for information about review rights through the Victorian Civil and Administrative Tribunal (**VCAT**).

My reasons for decision follow.

Penny Eastman  
Acting Public Access Deputy Commissioner

23 May 2024

## Reasons for Decision

### Background to review

1. The Applicant made a request to the Agency for:

...all documents, materials, notes, investigations, briefings, recordings, legal correspondence and advice in relation to complaints (other than my own) made by [third parties] regarding [named person's] conduct during [specified circumstances]...
2. Shortly after, the Applicant amended the request to seek access to:

All documents concerning the Local Government Inspectorate's investigation in regard to the conduct of [named person] in relation to the following matters:

  - [specific details omitted]

For the purpose of this request documents include hardcopy and electronic documents, including letters, emails, file notes, councillor briefing notes and recordings and legal advice (with the legally privileged content of that advice redacted). Excluded from this request is all emails passing to and from me.
3. Following notification from the Agency under section 25A(6), the Applicant amended their request to seek:

A list of complaints made by [third parties] regarding [named person's] conduct during [circumstances omitted].
4. The information requested by the Applicant did not exist as a discrete document. Accordingly, the Agency created a document containing the information requested by the Applicant under section 19. The Agency decided to refuse access to the document in full under sections 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. I have examined a copy of the document subject to review.
7. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
8. I have considered relevant communications and submissions received from the parties.
9. 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.
10. 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.

*Irrelevant information*

11. During the course of the review, the Agency confirmed that certain information in the document related to a complaint made by the Applicant.
12. I am satisfied this information is outside the scope of the Applicant's request terms. It is therefore irrelevant information for the purpose of the FOI Act in this case and has not been considered further in my review. It would be open to the Agency to release this content to the Applicant separately outside of the FOI Act, if required.

**Review of exemptions**

*Section 33(1) – Document affecting personal privacy*

13. A document is exempt under section 33(1) if two requirements are satisfied:
  - (a) the document contains or reveals 'information relating to the personal affairs of any person' (**personal affairs information**); and
  - (b) disclosure of the personal affairs information would be unreasonable in the circumstances.

*First requirement – does the document contain or reveal personal affairs information?*

14. Information relating to a person's 'personal affairs' includes information that identifies any person, discloses their address or location, or any information from which their identity, address or location may be reasonably determined.<sup>1</sup>
15. The concept of personal affairs information is broad, such that information will relate to the personal affairs of a person if it 'concerns or affects that person as an individual'.<sup>2</sup> It includes information relating to health, private behaviour, home life, or personal or family relationships of individuals.<sup>3</sup>
16. Personal affairs information can be revealed or indirectly disclosed by connecting or linking the information in the disclosed document with other information available to an applicant.<sup>4</sup>
17. The document is a list of complaints made to the Agency about a person other than the Applicant (the **third party**).
18. The document does not contain names or any other directly identifying information of a person or persons who made a complaint or complaints about the third party (a **complainant**).

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<sup>1</sup> Section 33(9).

<sup>2</sup> *Hanson v Department of Education & Training* [2007] VCAT 123 at [9].

<sup>3</sup> *Re F and Health Department* (1988) 2 VAR 458, quoted in *RFJ v Victoria Police FOI Division* [2013] VCAT 1267 [103] and [109].

<sup>4</sup> *Harrison v Victoria Police* [2022] VCAT 280 at [153].

19. However, I am satisfied that the identity of a complainant or complainants could be inferred from the dates and content of the complaints, even in the absence of direct identifiable information.
20. Further, I consider the document in full constitutes the personal affairs information of the third party, as complaints about people are inherently personal in nature.

*Second requirement – would disclosure of the personal affairs information be unreasonable in the circumstances?*

21. 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.
22. I must carefully weigh the facts and matters that ‘relevantly, logically, and probatively’ bear upon whether disclosure of the personal affairs information is unreasonable in the circumstances.<sup>5</sup>
23. The following factors are relevant in determining whether disclosure of the personal affairs information would be unreasonable in the circumstances:
  - (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;
  - (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; and
  - (g) whether disclosure of the information would or would be reasonably likely to endanger the life or physical safety of any person.<sup>6</sup>
24. After careful consideration, I am satisfied that providing access to information in the document would involve an unreasonable disclosure of the personal affairs information in the circumstances for the following reasons:
  - (a) I consider a complainant would not expect that details of their complaint would be provided to others beyond as necessary to progress the Agency’s investigation and management of their complaint. There is a public interest in ensuring that people are uninhibited from making complaints, so that any concerns are appropriately investigated and managed. It is likely that disclosing complaints under FOI processes, separate from a formal investigation process, would inhibit people from making complaints in future out

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<sup>5</sup> [2008] VSCA 218 at [98].

<sup>6</sup> Section 33(2A).

of concern their identity could be revealed to the complainant. If complaints of this nature were disclosed under the FOI process, it is reasonably likely that complaints would not be appropriately investigated or managed, which may have flow on effects to the Agency's ability to manage these complaints.

- (b) While I acknowledge the Applicant's reasons for seeking access to the document, I consider that disclosure would not promote an interest shared by the public.
  - (c) Disclosure under the FOI process is unconditional, and the document contain sensitive information about a third party, given the inherent nature of complaints. I consider the third party's privacy outweighs the Applicant's personal interest in the document in this instance.
  - (d) It is reasonably likely that a complainant or complainants would object to the document being disclosed to the Applicant.
  - (e) I have also considered the view of a third party to whom the document relates.
  - (f) As required, I have considered whether disclosure would or would or would be reasonably likely to endanger the life or physical safety of any person.
25. On careful consideration, I am satisfied that the document is exempt from release under section 33(1).

***Section 35(1)(b) – Documents containing material obtained in confidence***

26. A document is exempt under section 35(1)(b) if two requirements are satisfied:
- (a) disclosure would divulge information or matter:
    - (i) communicated in confidence;
    - (ii) 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 by reason that the disclosure would be reasonably likely to impair the ability of an agency or a Minister to obtain similar information in the future.

*First requirement – would disclosing the document divulge information or matter that was communicated in confidence to the Agency?*

27. Whether information was communicated in confidence is a question of fact,<sup>7</sup> determined from the perspective of the communicator.<sup>8</sup>
28. Confidentiality can be express or implied from the circumstances.<sup>9</sup>

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<sup>7</sup> *Ryder v Booth* [1985] VR 869, 883.

<sup>8</sup> *Woodford v Ombudsman* [2001] VCAT 721, [95]; *XYZ v Victoria Police* [2010] VCAT 255 at [265]; *Barling v Medical Board of Victoria* (1992) 5 VAR 542, 561-562.

<sup>9</sup> *Ryder v Booth* [1985] VR 869, 883; *XYZ v Victoria Police* [2010] VCAT 255 at [265].

29. I am satisfied confidentiality can be implied where complaints are made to the Agency, as complaints are inherently confidential in nature.

*Second requirement – would disclosure reasonably likely impair the ability of the Agency to obtain similar information in future?*

30. For information communicated in confidence to be exempt under section 35(1)(b), its disclosure must be reasonably likely to impair the Agency's ability to obtain similar information in the future.
31. It is not sufficient to merely establish that people would be less candid in future or would feel betrayed or feel resentment if the information were disclosed.<sup>10</sup> There must be an actual impairment to the ability of the agency to obtain like information in the future.<sup>11</sup>
32. For the same reasons set out in paragraph 24(b) above, I am satisfied that disclosing the document would inhibit the Agency from obtaining similar information in future.
33. As such, I am satisfied information in the document is exempt from release under section 35(1)(b).

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

34. 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.
35. Deciding whether it is 'practicable' to delete exempt or irrelevant information requires consideration of:
- (a) the effort involved in making the deletions from a resources point of view;<sup>12</sup> and
  - (b) the effectiveness of those deletions – that is, whether the edited document still has meaning.<sup>13</sup>
36. As noted above, certain information in the document is irrelevant to the Applicant's request terms. I have found all other substantive content is exempt from disclosure under sections 33(1) and 35(1)(b).
37. I am satisfied it is not practicable to provide the Applicant with an edited copy of the document with exempt and irrelevant information deleted in accordance with section 25 as the document would be meaningless as no content as sought by the Applicant would be released.

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<sup>10</sup> *Ryder v Booth* [1985] VR 869, referred to in *Mees v University of Melbourne* [2009] VCAT 782 at [54].

<sup>11</sup> *Birnbauer & Davies v Inner & Eastern Health Care Network* [1999] VCAT 1363 at [68].

<sup>12</sup> *Mickelborough v Victoria Police* [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>13</sup> *Honeywood v Department of Human Services* [2006] VCAT 2048, [26]; *RFJ v Victoria Police FOI Division (Review and Regulation)* [2013] VCAT 1267, [140], [155]; *Re Hutchinson and Department of Human Services* (1997) 12 VAR 422

## Conclusion

38. On the information before me, I am satisfied information in the document is irrelevant to the Applicant's request and other information is exempt from release under sections 33(1) and 35(1)(b).
39. I consider deleting this information under section 25 renders the document meaningless and is therefore not practicable for the purposes of section 25. Access is therefore refused in full.

## Timeframe to seek a review of my decision

40. If the Applicant is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.<sup>14</sup>
41. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.<sup>15</sup>
42. 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.
43. If it becomes aware that the Applicant applies to VCAT for a review of my decision, the Agency is required to notify the Information Commissioner in writing as soon as practicable.<sup>16</sup>

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<sup>14</sup> Section 50(1)(b).

<sup>15</sup> Section 52(5).

<sup>16</sup> Section 50(3FA).