

## Notice of Decision and Reasons for Decision

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Applicant:	'F18'
Agency:	Melbourne Water
Decision date:	7 September 2023
Exemption considered:	Section 33(1)
Citation:	'F18' and Melbourne Water (Freedom of Information) [2023] VICmr 88 (8 September 2023)

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FREEDOM OF INFORMATION – water authority – Moonee Valley Planning Scheme Amendment – Maribyrnong River Flood Event Independent Review – third party personal affairs information – agency officer names – disclosure unreasonable – disclosure contrary to the public interest

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 document is exempt from release under section 33(1).

As I am satisfied it remains 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 document in part.

My reasons for decision follow.

Joanne Kummrow  
**Public Access Deputy Commissioner**

7 September 2023

## Reasons for Decision

### Background to review

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

A copy of the attached letter dated [date] from [the Agency] to [a third party] with the subject heading "re Moonee Valley Planning Scheme Amendment[number]". This freedom of information request asks for this document in full with no redacted details and no material in the letter considered out of scope, although I am happy for phone numbers to be redacted.

2. The Agency identified one document falling within the terms of the Applicant's request and granted access to it in part, under section 33(1). 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 in part.
4. I have examined a copy of the document subject to review which concerns the Moonee Valley Planning Scheme Amendment[number]. The document consists of three pages and comprises a covering letter dated[date], which was written and signed by a [Agency officer], that is addressed to a private company. The document is copied to a named person at the local council. It also includes two attachments that are plans of the relevant sites to be affected by the amendment to the planning scheme.
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.

### Background

9. In October 2022, Victoria experienced heavy rainfall and storms, which led to detrimental flooding events across the State. The flooding also occurred within the catchment of the Maribyrnong River.

10. In response to the flooding event, the Legislative Council agreed that the Environment and Planning Committee is to inquire into, consider and report, by 30 June 2024, on the State's preparedness for and response to the major flooding event of October 2022 (**Inquiry**).<sup>1</sup>

11. The Maribyrnong River Flood Event Independent Review (**Review**) was also established to investigate the flood's causes and contributors.

12. The Agency's website provides the following information about the Review:

The Maribyrnong River Flood Review is an independent technical review that will examine the causes and contributors to the flood event in the urban catchment, including:

- Any potential impacts of the Flemington Racecourse Flood Wall on the extent and duration of the Flood Event.
- Any impact of prior works or activities in the urban catchment on flood levels and extent during the Flood Event.
- Any other matters that may have significantly contributed to the Flood Event.

Melbourne Water is committed to an independent and transparent review process and the Maribyrnong River Flood Review is being undertaken by an Independent Review Panel.

The Review Lead will provide a written report to Melbourne Water assessing the matters outlined in the Terms of Reference. Melbourne Water will submit the review report to the Victorian Government and will publicly release the review report at the conclusion of the process.<sup>2</sup>

13. The Review will result in a report being provided to the Agency and the report will be released to the public at the conclusion of the review.

## Review of exemptions

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

14. 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**);<sup>3</sup> and
- (b) such disclosure would be 'unreasonable'.

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

15. 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>4</sup>

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<sup>1</sup> Parliament of Victoria website, *Inquiry into 2022 Flood Event in Victoria*, <https://new.parliament.vic.gov.au/floodinquiry>.

<sup>2</sup> Melbourne Water website, *Maribyrnong River Flood Review* at <https://www.melbournewater.com.au/services/projects/maribyrnong-river-flood-review>.

<sup>3</sup> Sections 33(1) and 33(2).

<sup>4</sup> Section 33(9).

16. A document will disclose a third party's personal affairs information if it is capable, either directly or indirectly, of identifying that person.<sup>5</sup> 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.

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

17. The concept of 'unreasonable disclosure' involves balancing the public interest in the disclosure of official information with the interest in protecting an individual's personal privacy in the particular circumstances.
18. In *Victoria Police v Marke*,<sup>6</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>7</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>8</sup>
19. 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

While generally there may be nothing particularly sensitive about identifying an individual undertaking duties in their professional capacity; nevertheless, there is no absolute rule as to how the exemption under section 33(1) may apply for an individual referred to in documents where the information recorded concerns them, in their professional capacity.<sup>9</sup>

The third party personal affairs information under review is contained in a letter, through a planning process between the Agency and a Development Advisor. I consider the personal affairs information was obtained by the Agency in the course of the Agency officer undertaking their professional duties.

The Agency's submissions, dated [date], submits:

... The responsive document was created on the assumption that the identities of those involved would not be disseminated into the public sphere...

The subject matter of the review document has received substantial media attention concerning the Agency's involvement in the 2022 Victorian floods.

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<sup>5</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>6</sup> [2008] VSCA 218 at [76].

<sup>7</sup> *Ibid.*

<sup>8</sup> *Ibid* at [79].

<sup>9</sup> *Harrison v Police (Vic)* [2022] VCAT 280 at [138]-[148].

On [date], the Agency further submitted:

... the Planning Committee's Inquiry into the 2022 Flood Event in Victoria (Inquiry) is an ongoing investigation with substantial media coverage and wide-ranging implications to its findings ...

... The Review and Inquiry are investigating the events that led to the Maribyrnong River Flood Event that occurred on 14 October 2022. These processes are ongoing, with public hearings for the Review having commenced 17 July 2023 and public hearings for the Inquiry due to commence in August 2023...

... A key issue in this Inquiry is the events which led to the flooding of [a property], including [the removal of a land subject to inundation overlay]...

Considered in this context, I accept there are sensitivities associated with the release of the personal affairs information of two individuals named in the documents.

(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).<sup>10</sup>

In their review application, the Applicant states:

...the public should know which public sector employees make decisions, especially where they have been this consequential...

...Given the seriousness of what occurred as a result of the decision to remove the flood overlay from this land, disclosure should have been considered reasonable...

I acknowledge the Applicant's interest in seeking release of the personal affairs information in the document. 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 consider there are public interest factors both for and against disclosure in this case. I also note the importance of what's in the public interest and what may be of interest to the public are differing concepts.<sup>11</sup>

In their review application, the Applicant asserts:

... There is an extraordinarily strong public interest argument that Melbourne Water should have kept in mind when deciding on what was to be redacted from the material

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<sup>10</sup> *Victoria Police v Marke* [2008] VSCA 218 at [104].

<sup>11</sup> *Director of Public Prosecutions v Smith* [1991] VicRp 6; [1991] 1 VR 63, 74-76; *Gibson v Latrobe City Council* [2008] VCAT 1340 at [74].

released to me. The public should know which public sector employees make decisions, especially where they have been this consequential ...

... Agency staff are regularly identified in planning matters while carrying out their role as a public sector employee. Consequently, personal information such as their name should not be considered exempt from this FOI Request ...

I acknowledge the Applicant's interest in obtaining access to the requested document in full given their concerns and views, as described above.

It is accepted that public sector employees, are expected to withstand some level of public scrutiny in relation to carrying out their professional duties. However, such scrutiny must be carefully balanced with an individual's right to personal privacy given the potential for them to be subject to an unwarranted or inappropriate level of public attention or harassment if their personal affairs information, such as their name or position title, is disclosed under the FOI Act.

The Agency submits:

...While the media has an important role to publicise information in the public interest, any benefit that would be gained from the disclosure of this document will be achieved by the existing processes of the Review and Inquiry. These processes allow the parties and systems involved in the Flood Event to be reviewed whilst protecting the identity of persons involved...

... the personal affairs information in the responsive document implicate the two named individuals [name] and [name], as potentially playing a role in this decision ...

Having carefully considered the context and sensitivities surrounding the disclosure of the personal affairs information in the document, I do not consider release of this information is required to serve a public interest in determining 'who made the final decision'. In this regard, I note the Agency disclosed all substantive information in the document to the Applicant except for limited personal affairs information.

Furthermore, I do not consider the information before me calls for greater scrutiny in circumstances where an Inquiry and Review panel are investigating the issues.

(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.<sup>12</sup>

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.

In considering the identity of the Applicant, I am satisfied it is reasonably likely they would disseminate the personal affairs information in the document, if it is released in full. This is an important factor in this matter, noting the context of the document.

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<sup>12</sup> *Victoria Police v Marke* [2008] VSCA 218 at [68].

As such, I acknowledge the concerns of the third parties around the possibility of having their names published and possible public and media attention that may be focused on the relevant individuals who are non-executive employees of the Agency and local council.

(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.<sup>13</sup> However, this obligation does not arise in certain circumstances, including where it is not practicable to do so.<sup>14</sup>

A summary of the responses to the Agency's third party consultation was provided for my consideration. Having reviewed the information, I acknowledge that one third party objected to release on the basis they were copied into the correspondence only, one third party agreed to the release of their name and one third party could not be contacted despite various attempts to reach them.

The Agency also submits:

...the disclosure of the responsive document is highly likely to raise health and wellbeing concerns for the named individuals...

I accept the circumstances of this matter have been the subject of significant public attention, and I have given significant weight to the views or likely views of two third parties and their right to personal privacy. I also accept the Agency's submission above in relation to two persons named in the document, as disclosure of their names would likely cause those persons undue stress and anxiety, with the potential for an adverse health and wellbeing outcome.

(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.<sup>15</sup>

20. Having weighed up the above factors, on balance, I am satisfied disclosure of the personal affairs information of third parties in the document would be unreasonable for the following reasons:

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<sup>13</sup> Section 33(2B).

<sup>14</sup> Section 33(2C).

<sup>15</sup> Section 33(2A).

- (a) The matter to which the document relates is currently under Review and Inquiry and there is no information before me to suggest greater public scrutiny is warranted or required to assist the public's understanding of the document.
- (b) The substantive information in the document was released by the Agency to the Applicant and release of the names of the two individuals is not necessary to understand the nature and content of the document.
- (c) In these circumstances, it is reasonable to conclude that there is a potential for the third parties' personal affairs information being subject to dissemination and media attention. I have given weight to the views of the third parties and the likelihood of them being publicly named, but with limited ability to respond as individuals to any likely resultant media or other public commentary.

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

- 21. 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.
- 22. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'<sup>16</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>17</sup>
- 23. Given my decision is the same as the Agency's decision and it granted access to the document 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**

- 24. On the information before me, I am satisfied certain information in the document is exempt from release under sections 33(1).
- 25. 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.

### **Review rights**

- 26. 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.<sup>18</sup>

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<sup>16</sup> *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].

<sup>17</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] and [155].

<sup>18</sup> The Applicant in section 50(1)(b) and the Agency in section 50(3D).



27. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.<sup>19</sup>
28. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.<sup>20</sup>
29. 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.
30. 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>21</sup>

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<sup>19</sup> Section 52(5).

<sup>20</sup> Section 52(9).

<sup>21</sup> Sections 50(3F) and 50(3FA).