

Notice of Decision and Reasons for Decision

Applicant:	'FO3'
Agency:	City of Melbourne
Decision date:	29 January 2024
Sections considered:	31(1)(a) and 33(1)
Citation:	'FO3' and City of Melbourne (Freedom of Information) [2024] VICmr 16 (29 January 2024)

FREEDOM OF INFORMATION – local government – council - investigation report – applicant's property – personal affairs information – unreasonable disclosure

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.

While I am satisfied certain information is exempt from release under section 33(1), I am not satisfied information to which the Agency refused access under section 31(1)(a) is exempt from release.

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

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

My reasons for decision follow.

Please refer the end of this decision for information about further review rights through the Victorian Civil and Administrative Tribunal.

Shantelle Ryan
Acting Public Access Deputy Commissioner

29 January 2024

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:

Document from [name of investigator] ([business name]) dated [date of report] relating to [address of property].
2. The Agency identified one document falling within the terms of the Applicant's request and refused access to it in full under sections 31(1)(a) and 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.
4. During the review, the Applicant also advised they are not seeking information relating to the personal affairs of others and stated that it is reasonable to omit any names of third parties.
5. I have examined a copy of the document subject to review.
6. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
7. I have considered all communications and submissions received from the parties.
8. 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.
9. 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 31(1)(a) – Disclosure of documents that would prejudice the enforcement or proper administration of the law

10. Section 31(1)(a) provides:

31 Law enforcement documents

Subject to this section, a document is an exempt document if its disclosure under this Act would, or would be reasonably likely to —

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- (a) prejudice the investigation of a breach or possible breach of the law or prejudice the enforcement or proper administration of the law in a particular instance;
11. 'Reasonably likely' means that there is a real chance of an event occurring; it is not fanciful or remote.¹ 'Prejudice' means to hinder, impair or undermine and includes actual prejudice as well as impending prejudice.² 'In a particular instance' does not require a single specific investigation. This phrase can encompass specific, identified aspects of law, administration of law or investigations of breaches or potential breaches of law.³
12. In considering the application of section 31(1)(a), I have had regard to the nature of disclosure under the FOI Act, which provides for disclosure without any conditions or restrictions on an applicant's future use or further dissemination of a document. This is in contrast to legal proceedings, where restrictions or conditions can be placed on the use of documents. Accordingly, I have considered the likelihood and potential effects of further dissemination of the document.
13. I acknowledge the confidential nature of the Agency's submission to OVIC. I am constrained from describing in detail the information contained in the Agency's submission as to do so would disclose confidential information. However, I note the Agency considers disclosure would affect its ability to carry out its functions under the *Building Act 1993* (Vic).
14. The Applicant submits:
- The Applicant is dissatisfied with [the Agency]'s decision to refuse access to the document in full which was written about the Applicant's own property relating to [address of property].
- ...
- ...The Applicant willingly communicated with the external contract investigator, however at no stage during the communication did the Applicant:
- a) agree to an interview
 - b) provide a formal response
 - c) receive prior notification that email correspondence would be used for reporting
 - d) receive prior notification that formal report would be written
- ...
- The Applicant has not been notified of a breach or pending law enforcement action and the document has not been identified as a law enforcement document.
15. I acknowledge the Applicant's interest in obtaining access to the document, particularly as it concerns their property, however, I also accept the Agency has compliance and regulatory obligations and this is an important consideration.

¹ *Bergman v Department of Justice Freedom of Information Officer* [2012] VCAT 363 at [65], quoting *Binnie v Department of Agriculture and Rural Affairs* [1989] VR 836.

² *Ibid*, Bergman at [66], referring to *Sobh v Police Force of Victoria* [1994] VicRp 2; [1994] 1 VR 41 (Nathan J) at [55].

³ *Cichello v Department of Justice (Review and Regulation)* [2014] VCAT 340 at [24].

16. I am not satisfied disclosure of the information in the document would be reasonably likely to prejudice the effectiveness of an investigation. I consider the type of information in the document is mostly factual and already known to the Applicant. Based on the information before me, the Applicant is aware of the allegations and that the Agency is investigating possible breaches relating to their property. In my view the document does not contain any information that would affect the ability of the Agency to carry out its regulatory functions.
17. Accordingly, I have determined disclosure of information in the document would not be unreasonable and is not exempt from release under section 31(1)(a).
18. My decision in relation to section 31(1)(a) is set out in the Schedule of Documents at **Annexure 1**.

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

19. 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’.

Does the document contain personal affairs information of individuals other than the Applicant?

20. 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.⁵
21. 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.⁶
22. The document contains the name of a third party and other personal information that could be used to identify that third party.
23. As the Applicant is not seeking names of the third parties, all names apart from their own are irrelevant to the matter and are to be deleted throughout the document in accordance with section 25 of the FOI Act.
24. However, given the broad scope of what can be considered personal affairs information under the FOI Act, I consider there is information the Applicant seeks that also amounts to personal affairs information. This information is:

⁴ Sections 33(1) and 33(2).

⁵ Section 33(9).

⁶ *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].

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- (a) On page 1, under the summary heading, in the eighth paragraph, from the 12th word to the end of that sentence.
 - (b) On page 2, the 10th paragraph and the first three words of the 11th paragraph.
 - (c) On page 2, the heading that appears after the 11th paragraph and the five paragraphs beneath that heading following over to page 3. In the last paragraph under that heading, from the fourth sentence to the end of the paragraph.
 - (d) On page 3, under the heading 'conclusion', in the first paragraph the third sentence. In the second paragraph, from the 11th word to the 18th word of that sentence.
25. The document also includes a mobile telephone number that amounts to personal affairs information.
26. I have therefore considered whether disclosure of this information would be unreasonable.

Would disclosure of the personal affairs information be unreasonable?

27. 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.
28. 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 the information was obtained

The document subject to review is a report concerning the Applicant's property. The information was obtained by the Agency as part of an investigation into a complaint.

I consider the personal affairs information in the document to be sensitive, having been obtained by the agency on a confidential basis and for the purpose of the investigation.

- (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).⁷

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.

⁷ *Victoria Police v Marke* [2008] VSCA 218 at [104].

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I also consider the applicant's objectives in requesting the document will be broadly met by partial release of the document with personal affairs information, broadly defined, deleted.

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

The Applicant's interest in obtaining access is primarily of a private nature and while I understand the Applicant's interest in obtaining access, I am not satisfied this interest is outweighed by the competing public interest in maintaining the personal privacy of the third parties concerned.

(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.⁸

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.

While there is no information before me that suggests the information would be disseminated by the Applicant, I consider this factor weighs against disclosure given the sensitivity of the circumstances of this matter.

(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.⁹ 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.¹⁰

Based on the information before me, it appears the Agency did not undertake consultation with the third parties, as required under section 33(2B).

⁸ Ibid at [68].

⁹ Section 33(2B).

¹⁰ Section 33(2C).

However, in the circumstances of this matter, I consider it would be reasonably likely that the relevant individuals would object to release of their personal affairs information in the document.

- (f) Whether disclosure of the information would or would be reasonably likely to endanger the life or physical safety of any person¹¹

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

I do not consider this is a relevant factor in the circumstances of this matter.

29. Based on the above information, I have determined disclosure of certain personal affairs information in the document would be unreasonable and is therefore exempt from release under section 33(1).
30. My decision in relation to section 33(1) is set out in the Schedule of Documents at **Annexure 1**.

Section 25 – Deletion of exempt or irrelevant information

31. 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.
32. Determining what is ‘practicable’ requires consideration of the effort and editing involved in making the deletions ‘from a resources point of view’¹³ 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 25.¹⁴
33. I have considered the effect of deleting irrelevant and exempt information from the document. In my view, it is practicable for the Agency to delete the irrelevant and exempt information, because it would not require substantial time and effort, and the edited document would retain meaning.

Conclusion

34. On the information before me, I am satisfied certain information in the document is exempt from release under section 33(1), however I am not satisfied the document is exempt under section 31(1)(a).

¹¹ Section 33(2A).

¹² Section 33(2A).

¹³ *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].

¹⁴ *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].

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

Timeframe to seek a review of my decision

36. 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.¹⁵
37. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹⁶
38. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹⁷
39. 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.
40. 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.¹⁸

When this decision takes effect

41. 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.

¹⁵ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

¹⁶ Section 52(5).

¹⁷ Section 52(9).

¹⁸ 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]	Investigation Report Ref No: [reference number]	4	<p>Refused in full</p> <p>Sections 31(1)(a) and 33(1)</p>	<p>Release in part</p> <p>Sections 33(1), 25</p> <p>The document is to be released except for the following information which is exempt under section 33(1) and is to be deleted in accordance with section 25:</p> <ul style="list-style-type: none"> On page 1, under the summary heading, in the eighth paragraph, from the 12th word to the end of that sentence. On page 2, the 10th paragraph and the first three words of the 11th paragraph. On page 2, the heading that appears after the 11th paragraph and the five paragraphs beneath that heading following over to page 3. In the last paragraph under that 	<p>Section 31(1)(a): I am not satisfied the information in the document would be likely to prejudice the effectiveness of the investigation for the reasons outlined in the Notice of Decision, above.</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 25: I am satisfied it is practicable to provide the Applicant with an edited copy of this document with exempt and irrelevant information deleted in accordance with section 25.</p>

Document No.	Date of document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
					<p>heading, the fourth sentence to the end of the paragraph.</p> <ul style="list-style-type: none"> • On page 3, under the heading 'conclusion', in the first paragraph the third sentence. In the second paragraph, from the 11th word to the 18th word of that sentence. • The mobile telephone number appearing at the top of each page. <p>The following information is also to be deleted as it is irrelevant to the request:</p> <ul style="list-style-type: none"> • The names of all third parties in the document. 	