

Notice of Decision and Reasons for Decision

Applicant:	'FU1'
Agency:	Moyne Shire Council
Decision date:	21 February 2025
Exemptions and provisions considered:	Section 27(2)(b), 31(1)(a), 31(1)(c), 31(1)(e)
Citation:	'FU1' and Moyne Shire Council (Freedom of Information) [2025] VICmr 10 (21 February 2025)

FREEDOM OF INFORMATION – Agency decision to neither confirm nor deny the existence of documents – internal communications – incident involving Agency officers – not satisfied all documents would be exempt under section 31

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 fresh decision to refuse access to documents requested by the Applicant under the FOI Act.

My decision on the Applicant's request differs from the Agency's decision. I am satisfied that the Agency's decision does not relate to a request for access to documents that are exempt under sections 31(1)(a), 31(1)(c) or 31(1)(e), or that if existed, would be exempt documents under these sections.

The effect of my decision is the Agency is required to reconsider the Applicant's request and produce a decision identifying each document falling within the Applicant's request and specifying any exemption claimed in full or in part under the FOI Act.

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

My reasons for decision follow.

Penny Eastman
Public Access Deputy Commissioner

21 February 2025

Reasons for Decision

Background to review

1. The Applicant's request sought access to:

all email correspondence re; the incident with [various third parties] that has circulated around the Moyne Shire Council.
2. The terms of the Applicant's request were later clarified and is quoted in the Agency's decision letter as:

All email correspondence circulated to / from members of Moyne Shire Council staff; between the timeframe of [date] (date of incident) and [date] (date of request) that is relevant (Collins Dictionary definition) to: [an incident involving the Applicant].
3. The Agency refused access to the documents under section 25A(5) on the basis that all documents, should any exist, would be exempt from release under sections 30(1), 33(1) and 35(1)(b) and it would not be practicable to provide edited copies of documents with exempt information deleted. The Agency's decision letter sets out the reasons for its decision.

Review application

4. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
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 relevant 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.
9. In conducting a review under section 49F, section 49P requires that I make a new or 'fresh decision'. Therefore, my review does not involve determining whether the Agency's decision is correct, but rather requires my fresh decision to be the 'correct or preferable decision'.¹ This involves ensuring my decision is correctly made under the FOI Act and any other applicable law in force at the time of my decision.

¹ *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577 at [591].

OVIC'S initial view and the Agency's Fresh Decision under section 49M

10. Following two submissions made by the Agency, OVIC staff provided the Agency with an initial view that an OVIC Commissioner would likely determine that the requirements of section 25A(5) had not been met. OVIC staff advised the Agency that certain categories of documents that may be in its possession in relation to the alleged incident would not be exempt in full.
11. Section 49M(1) permits an agency to make a fresh decision on an FOI request during a review.
12. On [date], the Agency made a fresh decision on the Applicant's request.
13. The Applicant did not agree with the Agency's fresh decision and I proceeded with my review on the basis of the Agency's fresh decision as required by section 49MA(2).
14. In its fresh decision, the Agency relied on section 27(2)(b) to neither confirm nor deny the existence of any documents relevant to the Applicant's request. The Agency's fresh decision letter states:

...I am permitted to state my decision in terms which neither confirm nor deny the existence of any document where *if they existed*, the documents would be exempt under, among other provisions, s 31 of the FOI Act. This does not require me to actually identify any documents falling within the Request.

...

Based on the above, I have determined that there is a real and not fanciful or remote chance that disclosure of any documents sought that may or may not exist, would hinder, impair or undermine, now or in the future, an investigation of a breach or possible breach of the law or, at the very least, the administration of the law, in a particular instance under s 31(1)(a) of the FOI Act.

I have also determined that there is a real, and not fanciful or remote, chance that any documents sought that may or may not exist, if disclosed to you would enable you to identify a confidential source of information having some direct or indirect connection to the enforcement or administration of the law under s 31(1)(c) of the FOI Act.

Further, I have determined that there is a real and not fanciful or remote chance that disclosure would endanger the lives or physical safety of persons having some direct or indirect connection to the enforcement of the law or who provided information having some connection to the administration or enforcement of the law. To be clear, by forming that view, I am not concluding that you necessarily pose a threat, but rather that there is sufficient material relating to past behaviour on which to conclude persons would have a reasonable apprehension of the possibility of confrontation or retaliation.

Review of section 27(2)(b)

15. An agency is not required to confirm or deny the existence of a document in a decision, where the decision relates to a document that is (or would be if it existed) an exempt document under sections 28, 29A, 31 or 31A.
16. By relying on section 27(2)(b) in conjunction with sections 31(1)(a), 31(1)(c) and 31(1)(e), the Agency is in effect stating that disclosure of any documents in its possession, if any exist:

- (a) would be reasonably likely to prejudice, in a particular instance, the investigation of a breach or possible breach of the law, or enforcement or proper administration of the law (section 31(1)(a)); and/or
- (b) would, or would be reasonably likely to disclose, or enable a person to ascertain the identity of a confidential source of information, and the confidential source has provided information in the context of the enforcement and administration of the law (section 31(1)(c)); and/or
- (c) would or would be reasonably likely to endanger the life or physical safety of a person, where that person is engaged in, or connected with law enforcement, or has provided confidential information in relation to the enforcement or administration of the law (section 31(1)(e)).

Section 31(1)(a) – investigation, enforcement or proper administration of the law

- 17. Section 31(1)(a) exempts documents where disclosure would be reasonably likely to prejudice, in a particular instance:
 - (a) the investigation of a breach or possible breach of the law; or
 - (b) enforcement or proper administration of the law.
- 18. An agency can rely on section 27(2)(b) where a requested document is exempt under section 31(1)(a), or if it existed, would be exempt from release under section 31(1)(a).
- 19. Accordingly, I must consider in this matter, without having viewed documents or confirmed their existence, whether they would be exempt from release under section 31(1)(a).
- 20. ‘Prejudice’ means to hinder, impair or undermine. This includes both actual prejudice as well as impending prejudice.²
- 21. ‘Would’ is a high threshold and means that a result or effect will almost certainly come about. In contrast, ‘would be reasonably likely to’ is a slightly lower threshold that requires the chance to be real, but not fanciful or remote.³
- 22. Section 31(1)(a) requires the identification of some specific aspect of the law (the particular instance) to which the information relates, as opposed to a broader, non-specific or generalised area of the law.⁴
- 23. The Agency states in its fresh decision that the Applicant is seeking documents that relate to, or are relevant to, an incident which was reported to Victoria Police that involved the Applicant. It further states that the Agency is not aware of the status of Victoria Police’s investigation, nor is there information before the Agency to suggest that an investigation or possible future action in relation to the incident has been concluded.

² *Bergman v Department of Justice* [2012] VCAT 363, [66], referring to *Sobh v Police Force of Victoria* [1994] 1 VR 41, 55.

³ *Akers v Victoria Police* [2022] VCAT 979, [26] quoting *Binnie v Department of Agriculture and Rural Affairs* [1989] VR 836; *Tucker v Commissioner of State Revenue* [2019] VCAT 2018, [113(b)].

⁴ *Simons v Department of Justice* [2006] VCAT 2053, [36].

24. The Agency's original decision and fresh decision also attached a letter that the Applicant received from [the Agency] in relation [to the incident and their alleged behaviour, amongst other things] In this instance, the Agency is of the view that disclosure of emails sent to or from Agency officers following the alleged incident involving the Applicant (should any exist) would 'hinder, impair or undermine, now or in the future, an investigation of a breach or possible breach of the law or, at the very least, the administration of the law, in a particular instance'. I note the Agency did not identify the specific law (legislation or regulation) that is being administered.
25. Without having viewed the documents and based on the information before me, I consider the documents (should any exist) would reasonably likely contain recollections of the incident by persons involved and the Agency's deliberation on how to manage the incident, including its decision to report the incident to Victoria Police and to have [the Agency] write to the Applicant regarding the incident.
26. There is no information before me about how the Agency considers disclosure of any correspondence in relation to the incident would hinder, impair, undermine any investigation or possible investigation into the incident by Victoria Police or the Agency, or prejudice the administration of a law in a particular instance. As such, the Agency has not established any potential prejudice to an investigation or possible investigation.
27. Accordingly, I am not satisfied that the documents, if any exist, would be exempt from release under section 31(1)(a).

Section 31(1)(c) – identification of confidential sources

28. A document or information is exempt under section 31(1)(c) if:
 - (a) disclosure of the information would, or would be reasonably likely to disclose, or enable a person to ascertain the identity of a confidential source of information; and
 - (b) the confidential source has provided information in the context of the enforcement or administration of the law.
29. An agency can rely on section 27(2)(b) where a requested document is exempt under section 31(1)(c), or where a requested document would be exempt from release under section 31(1)(c) if it existed.
30. In this matter, the Agency considered that there is a real, and not fanciful or remote, chance that disclosure of any documents, should any exist, would enable the Applicant to identify a confidential source of information 'having some direct or indirect connection to the enforcement or administration of the law'.
31. Section 31(1)(c) protects the identity of confidential sources of information in relation to the enforcement or administration of the law. It protects the identities of persons providing confidential information to those responsible for investigating corruption, misconduct, or a

breach of the law.⁵ A confidential source is an informer providing information that the alleged perpetrator and public do not know about.

32. Section 31(1)(c) does not protect sources of information whose identity is public or obvious.⁶ For example, where the identity of the author of the document is known to the applicant.⁷
33. I am not satisfied that disclosing whether communications exist with respect to an alleged incident involving the Applicant would reveal a confidential source of information.
34. While I accept any communications involving the Agency about the incident would have been treated confidentiality, I do not accept the Agency officers are 'confidential sources'. Further, the Applicant could make inferences about who may have been involved in communications about the incident, as they are aware of the identity of certain Agency officers involved either in the incident, or who were involved in responding to the incident.
35. Accordingly, I am not satisfied documents requested by the Applicant, should any exist, would be exempt under section 31(1)(c).

Section 31(1)(e) – endanger the life or physical safety

36. A document or information is exempt under section 31(1)(e) where:
 - (a) disclosure of the document or information would or would be reasonably likely to endanger the life or physical safety of a person; and
 - (b) where that person:
 - (i) is engaged in, or connected with law enforcement; or
 - (ii) has provided confidential information in relation to the enforcement or administration of the law.
37. When deciding if disclosure of a document would be reasonably likely to endanger the lives or physical safety of relevant persons, the following are relevant considerations:
 - (a) there must be a real chance of the harm occurring, rather than a fanciful or remote chance;⁸
 - (b) the danger need only be reasonably likely, not a certainty;⁹
 - (c) the danger to the relevant persons must arise from the disclosure of the specific document rather than from other circumstances;¹⁰

⁵ *XYZ v Victoria Police* [2010] VCAT 255, [154].

⁶ *Re Coleman and Director General Local Government Department* (1985) 1 VAR 9, 13.

⁷ *Accident Compensation Commission v Croom* [1991] 2 VR 322, 329.

⁸ *Department of Agriculture and Rural Affairs v Binnie* [1989] VR 836, 842.

⁹ *Department of Agriculture and Rural Affairs v Binnie* [1989] VR 836, 844.

¹⁰ *Re Lawless and Secretary to Law Department* (1985) 1 VAR 42, 50–51.

- (d) the danger could arise from the applicant, but also from others if the information becomes generally known;¹¹
- (e) physical safety not only includes actual safety but also the relevant person's perception of whether they are safe;¹² and
- (f) it is the impact on the relevant person that is relevant, not the motives of the applicant.¹³

38. The Agency's fresh decision states:

...there is a real and not fanciful or remote chance that disclosure would endanger the lives or physical safety of persons having some direct or indirect connection to the enforcement of the law or who provided information having some connection to the administration or enforcement of the law. To be clear, by forming that view, I am not concluding that you necessarily pose a threat, but rather that there is sufficient material relating to past behaviour on which to conclude persons would have a reasonable apprehension of the possibility of confrontation or retaliation.

39. The fresh decision also alleges that the Applicant engaged in [alleged aggressive correspondence with the Agency].

40. I accept that the incident involving the Applicant would have involved behaviour which the Agency considered serious enough to warrant contact with Victoria Police. Considering this, while disclosure would not reasonably likely result in actual physical harm to the persons who were involved in the incident or who responded to the incident, I consider there is sufficient information before me to be satisfied disclosure of documents would be reasonably likely to endanger the physical safety of those persons because it would make them feel less safe.

41. To establish the section 31(1)(e) exemption, the person whose life or physical safety is endangered must:

- (a) be engaged in, or in connection with, law enforcement; or
- (b) have provided confidential information in relation to the enforcement or administration of the law.

42. I do not consider that persons whose physical safety may be endangered were engaged in, or were in connection with, law enforcement.

43. Further, as addressed above with respect to section 31(1)(c), while I accept communications about the incident would have been confidential, I do not consider the documents, if any exist, would disclose a confidential source of information.

44. Accordingly, I am not satisfied documents requested by the Applicant, should any exist, would be exempt under section 31(1)(e).

Conclusion on section 27(2)(b)

¹¹ *Department of Agriculture and Rural Affairs v Binnie* [1989] VR 836, 844; *Sloan v Secretary to the Department of Justice and Community Safety* [2019] VCAT 586, [52].

¹² *O'Sullivan v Police (Vic)* (2005) 22 VAR 426, [19].

¹³ *O'Sullivan v Police (Vic)* (2005) 22 VAR 426, [20].

45. I am satisfied documents that may fall within the scope of the Applicant's request (if any exist) would not be exempt under sections 31(1)(a), 31(1)(c) or 31(1)(e).

Conclusion

46. I am satisfied that the Agency's decision does not relate to a request for access to documents that are exempt under sections 31(1)(a), 31(1)(c) or 31(1)(e), or that if existed, would be exempt documents under these sections.
47. The effect of my decision is the Agency is required to reconsider the Applicant's request and produce a decision identifying any document/s falling within the Applicant's request and specifying any exemption claimed in full or in part under the FOI Act.

Timeframe to seek a review of my decision

48. If the Agency is not satisfied with my decision, it is entitled to apply to VCAT for it to be reviewed.¹⁴
49. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹⁵
50. 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.
51. The Agency is required to notify the Information Commissioner in writing as soon as practicable if it applies to VCAT for a review of my decision.¹⁶

When this decision takes effect

52. 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.

¹⁴ The Agency in section 50(3D).

¹⁵ Section 52(9).

¹⁶ Section 50(3F).

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