

## Notice of Decision and Reasons for Decision

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Applicant:	'FW1'
Agency:	Nillumbik Shire Council
Decision date:	8 April 2025
Exemptions and provisions considered:	Sections 25A(5), 31(1)(a), 31(1)(b)
Citation:	'FW1' and Nillumbik Shire Council (Freedom of Information) [2025] VICmr 28 (8 April 2025)

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FREEDOM OF INFORMATION – search warrant – affidavit – documents relating to issue and execution of warrant – ongoing investigation – law enforcement documents – prejudice enforcement or administration of law – prejudice fair trial.

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 all documents sought, as described in the Applicant's request, if they exist, would be exempt from release under sections 31(1)(a) and 31(1)(b), and there is no obligation for the Agency to grant access to an edited copy of a document in accordance with section 25.

Please refer to page 8 for information about review rights through the Victorian Civil and Administrative Tribunal (**VCAT**).

My reasons for decision follow.

Penny Eastman  
**Public Access Deputy Commissioner**

8 April 2025

## Reasons for Decision

### Background to review

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

The search warrant issued under Court ref [court reference number] which was executed for [address of property in Victoria] on [date provided] and all supporting documents including, but not restricted to, the affidavit and any other related documentation used to justify the issuance of the warrant.

The outcomes or any other related documentation concerning the execution of this warrant.
2. The Agency refused access to the requested documents, without processing the request, under section 25A(5) because it considered it was apparent from the nature of the documents described in the request that any such documents would be exempt under sections 31(1)(a), 31(1)(b), 31(1)(c) and 33(1). The Agency's decision letter, dated [date], 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. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
5. I have considered relevant communications and submissions received from the parties.
6. 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.
7. 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.

### Section 25A Requests may be refused in certain cases

8. Section 25A(5) provides an agency may refuse to grant access to documents in accordance with an FOI request:
  - (a) if it is apparent from the nature of the request all documents sought would be exempt under the FOI Act; and
  - (b) where it is not possible to provide the applicant with an edited copy of the documents with exempt information deleted, or it is clear the applicant does not seek an edited copy of the documents.

9. Importantly, an agency is not required to identify any or all documents relevant to a request or to specify any relevant exemption under which a particular document would be exempt.
10. The power under section 25A(5) is carefully circumscribed.<sup>1</sup> A decision maker must be satisfied the following three requirements are met, which operate to limit the application of section 25A(5):
  - (a) The exempt nature of the documents must be objectively apparent from the face of the request. Namely, the terms of the request, as described by the applicant. The 'nature' of a document refers to its inherent or essential quality or character.
  - (b) It must be apparent all requested documents are exempt.
  - (c) It must be apparent from:
    - (i) the nature of the documents, as described in the request, no obligation would arise for the agency to grant access to an edited copy of a document in accordance with section 25; or
    - (ii) the request, or through consultation with the applicant, they would not wish to have access to an edited copy of the document.<sup>2</sup>

***Is the nature of the requested documents objectively apparent from the face of the request?***

11. For section 25A(5) to apply, the first element is: it is apparent from the nature of the documents as described in the request that all of the documents to which the request is expressed to relate are exempt documents.
12. The nature of a document refers to the 'inherent or essential quality and character of the documents as described'.<sup>3</sup>
13. The objective nature of the requested documents are:
  - (a) the search warrant obtained by the Agency and any supporting documentation to obtain that warrant;
  - (b) any documents detailing the execution of the search warrant and the outcome of that search; and
  - (c) internal correspondence and communications about the property and search warrant.

***Would all documents, as described in the request, be exempt?***

14. It must be objectively apparent from the face of the request that all requested documents are exempt by their nature (under one or more exemption).<sup>4</sup>

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<sup>1</sup> *Knight v Corrections Victoria* [2010] VSC 338, [37]

<sup>2</sup> *Ibid.*

<sup>3</sup> *Ibid*, [38]-[39].

<sup>4</sup> *Ibid*, [37].

15. In refusing access to the requested documents under section 25A(5), the Agency considered the documents, should any exist, would be exempt from release under sections 31(1)(a), 31(1)(b), 31(1)(c) and 33(1).

*Section 31 – Law enforcement documents*

16. For more information about section 31 see the FOI Guidelines.<sup>5</sup>
17. The exemption in section 31(1) protects specific types of law enforcement documents. It does not exempt all law enforcement documents.<sup>6</sup>
18. Section 31(1) will not apply to the documents listed in section 31(2), where it is in the public interest to grant access to those documents.
19. ‘Prejudice’ is an element in the sections 31(1)(a), (b) and (d) exemptions. ‘Prejudice’ means to hinder, impair or undermine. This includes both actual prejudice as well as impending prejudice.<sup>7</sup>
20. The phrase ‘would or would be reasonably likely to’ is an element in all of the exemptions in section 31(1).
21. ‘Would’ is a high threshold and means that a result or effect will almost certainly come about. That is, disclosure of the information would, in fact:
- (a) cause some identifiable prejudice;<sup>8</sup> or
  - (b) identify the confidential source;<sup>9</sup> or
  - (c) disclose the method or procedure;<sup>10</sup> or
  - (d) endanger the life or physical safety of a person.<sup>11</sup>
22. In contrast, ‘would be reasonably likely to’ is a slightly lower threshold that requires the chance to be real, but not fanciful or remote.<sup>12</sup>

*Section 31(1)(a) – Disclosure of documents that would prejudice the enforcement or proper administration of the law*

23. Section 31(1)(a) exempts documents where disclosure would be reasonably likely to prejudice, in a particular instance:

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<sup>5</sup> <https://ovic.vic.gov.au/freedom-of-information/foi-guidelines/section-31/>.

<sup>6</sup> *Penhalluriack v Department of Labour and Industry* (unreported, County Court of Victoria, Lazarus J, 19 December 1983) 39; See also *O’Sullivan v Police Force (Vic)* (1986) 1 VAR 171, 177.

<sup>7</sup> *Bergman v Department of Justice* [2012] VCAT 363, [66], referring to *Sobh v Police Force of Victoria* [1994] 1 VR 41, 55.

<sup>8</sup> Sections 31(1)(a), (b) and (d).

<sup>9</sup> Section 31(1)(c).

<sup>10</sup> Section 31(1)(d).

<sup>11</sup> Section 31(1)(e).

<sup>12</sup> *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)].

- (a) the investigation of a breach or possible breach of the law; or
  - (b) enforcement or proper administration of the law.
24. An agency or Minister must identify a specific law and explain how the information relates to the enforcement or administration of the identified law.<sup>13</sup> These terms are broad and have wide application.
25. The words ‘in a particular instance’ qualify the words ‘investigation of a breach of the law’, ‘proper administration’ and ‘enforcement’. This narrows the scope of this exemption to a specific:
- (a) instance of a breach or possible breach of the law;<sup>14</sup> or
  - (b) aspect of investigations of breaches of the law or possible breaches of the law;<sup>15</sup> or
  - (c) instance or aspect of the law being enforced or administered.<sup>16</sup>
26. The ‘enforcement of the law’ and the ‘proper administration of the law’ mean different things:
- (a) Enforcement of the law deals with the actual process of enforcing the law (for example, prosecuting cases or pursuing fines and court orders).<sup>17</sup>
  - (b) The proper administration of the law deals with how the law is administered.<sup>18</sup> It requires a connection with the criminal law or with the process of upholding or enforcing the civil law (for example, the collection of information to monitor compliance with the law).<sup>19</sup>
27. The investigation must be an actual investigation about a breach of a law. The investigation will usually need to be active, not concluded, at the time of the request. However, an actual breach of the law does not need to be established. It is enough to suspect a breach, resulting in an investigation.
28. The information must relate to that specific investigation<sup>20</sup> and must have been prepared during, or for the purposes of, the specific investigation identified.<sup>21</sup>
29. When considering the likelihood of prejudice, it may be appropriate in some cases to consider the likelihood of the applicant sharing the disclosed information with others and the wider world.<sup>22</sup>

<sup>13</sup> *JCL v Victoria Police* [2012] VCAT 1060 [22] following *O’Sullivan v Police Force (Vic)* (1986) 1 VAR 171, 175-176.

<sup>14</sup> *O’Sullivan v Police Force (Vic)* (1986) 1 VAR 171, 175-176; *Lapidos v Office of Corrections (No 4)* (1990) 4 VAR 283.

<sup>15</sup> *Bergman v Department of Justice Freedom of Information Officer* [2012] VCAT 363, [69].

<sup>16</sup> *O’Sullivan v Police Force (Vic)* (1986) 1 VAR 171, 175-176; *Lapidos v Office of Corrections (No 4)* (1990) 4 VAR 283; *Bergman v Department of Justice Freedom of Information Officer* [2012] VCAT 363, [69].

<sup>17</sup> *JCL v Victoria Police* [2012] VCAT 1060, [28].

<sup>18</sup> *JCL v Victoria Police* [2012] VCAT 1060, [28].

<sup>19</sup> *Accident Compensation Commission v Croom* [1991] 2 VR 322, 324; *Cichello v Department of Justice* [2014] VCAT 340, [23], referring to *JCL v Victoria Police* [2012] VCAT 1060, [28] and *Accident Compensation Commission v Croom* [1991] 2 VR 322.

<sup>20</sup> *O’Sullivan v Police Force (Vic)* (1986) 1 VAR 171, 175-176; *Lapidos v Office of Corrections (No 4)* (1990) 4 VAR 283.

<sup>21</sup> *Shulver v Victoria Police Force* (1995) 9 VAR 71, 76.

<sup>22</sup> *XYZ v Victoria Police* [2010] VCAT 255, [185].

30. The Agency's decision letter states:

Given the scope of your request, the classification of documents sought all pertain to the property at [address].

The property is currently the subject of current law enforcement obligations pertaining to Building Notices and Orders and the matter is still before the Courts for anticipated legal proceedings.

31. I accept the Agency's submission that the requested documents would relate to the Agency's investigation and subsequent enforcement actions taken under the *Building Act 1993* (Vic), *Planning and Environment Act 1987* (Vic) and *Public Health and Wellbeing Act 2008* (Vic).
32. Having considered the Agency's submissions, I am satisfied relevant documents both would relate to a current investigation of a breach of the above laws, as well as the proper administration of those laws.
33. Furthermore, I am satisfied that disclosure of the documents, should any exist, would prejudice the Agency's investigation and the proper enforcement of the law for the following reasons:
- (a) Disclosure of documents under the FOI Act is unrestricted, which means they can be disclosed to the world at large once released to an applicant.
  - (b) There is an ongoing enforcement activity with current Building Notices and Orders, as well as anticipated legal proceedings.
  - (c) If the documents are disclosed, should any exist, the evidence obtained relating to the Agency's enforcement activities could become known to interested parties, which could enable them to decipher what is known, or unknown to the Agency in relation to alleged breaches of the law. This could result in parties taking actions to avoid or mitigate adverse legal consequences. This would prejudice the Agency's enforcement of the law.
  - (d) Disclosure of documents that led to the search warrant may inhibit the Agency from being notified of potential breaches of the law in future.
  - (e) Premature disclosure of any evidence or other information that may be relied on by the Agency as part of legal proceedings carries the risk of that evidence being interfered with, or otherwise enable interested parties to take actions to mitigate or prevent potential adverse consequences of any evidence or potential witness testimony that may be considered in any anticipated legal proceedings.
34. Therefore, I am satisfied that the requested documents, should any exist, would be exempt from release under section 31(1)(a).

*Section 31(1)(b) – Disclosure of documents that would prejudice the fair trial of a person or the impartial adjudication of a case*

35. A document or information is exempt under section 31(1)(b) if two conditions are satisfied:
- (a) the information relates to the trial of a person or adjudication of a particular case; and
  - (b) disclosure of the information would or would be reasonably likely to prejudice the fair

trial of the person or adjudication of the particular case.

*Would disclosure prejudice, or be reasonably likely to prejudice the fair trial of a person or the impartial adjudication of a particular case?*

36. A 'particular case' means that there is an identifiable legal proceeding.
37. The information must relate to either the criminal trial of a person, or a specific identifiable legal proceeding.<sup>23</sup>
38. It is in the interests of the administration of justice that legal matters, impartially adjudicated by a court, should not be prejudiced, and a party to a proceeding has a right to a fair trial. These important protections underpin the Australian legal system and are reflected by the provision in section 31(1)(b).
39. In determining whether the documents, should any exist, are exempt under section 31(1)(b), I have placed weight on the following factors:
  - (a) The FOI Act provides for the unrestricted and unconditional disclosure of information to an applicant. Therefore, it is open to an applicant to disseminate the disclosed information for any purpose or to any extent they wish.
  - (b) The documents are the subject of a current investigation with anticipated legal proceedings.
  - (c) Information in the documents is yet to be presented to and tested in open court.
  - (d) As stated above, the premature disclosure of any evidence or other information that may be relied on by the Agency as part of legal proceedings carries the risk of that evidence being interfered with, or otherwise enable interested parties to take actions to mitigate or prevent potential adverse consequences of any evidence or potential witness testimony that may be considered in any anticipated legal proceedings.
40. On consideration of the above, I am satisfied disclosure of the documents, should any exist, in circumstances where the documents involve evidence relevant to anticipated legal proceedings, would be reasonably likely to prejudice the impartial adjudication of the matter by the Court.
41. I note from the Applicant's review application that they have a genuine interest in seeking access to the requested documents. However, given the nature of the documents requested by the Applicant and the anticipated court proceedings, I am satisfied the legal requirements for the exemption are satisfied and the documents would be exempt under section 31(1)(b), if any exist.
42. In summary, on the information before me, given the nature of the requested documents, I am satisfied that should any documents exist, they would be exempt from release under sections 31(1)(a) and 31(1)(b). Therefore, I have not considered the application of sections 31(1)(c) or 33(1).

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<sup>23</sup> *Barnes v Commissioner for Corporate Affairs (No 2)* (1987) 1 VAR 438, 442.

***Is it apparent that no obligation would arise for the agency to grant access to an edited copy of a document in accordance with section 25?***

- 43. It must be objectively apparent from the nature of the documents, as described in the request, that it would not be practicable to provide an edited copy of any of the documents, under section 25.<sup>24</sup>
- 44. 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.
- 45. Given the nature of the request, and my assessment above, I am satisfied it would not be practicable to grant access to an edited copy of one or more documents, with exempt information deleted in accordance with section 25. As such, I am satisfied the third requirement of section 25A(5) is met.

**Conclusion**

- 46. On the information before me, I am satisfied all documents sought, as described in the Applicant's request, if they exist, would be exempt from release under sections 31(1)(a) and 31(1)(b), and there is no obligation for the Agency to grant access to an edited copy of a document in accordance with section 25.
- 47. I note, however, that my decision is based on the circumstances at this time. If the Applicant makes their request at a later date after the Agency's investigation is completed, and any legal proceedings concluded, it is unlikely that their request would be refused under section 25A(5).

**Timeframe to seek a review of my decision**

- 48. If the Applicant is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.<sup>25</sup>
- 49. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.<sup>26</sup>
- 50. 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.
- 51. The Agency is required to notify the Information Commissioner in writing as soon as practicable if the applicant applies to VCAT for a review of my decision.<sup>27</sup>

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<sup>24</sup> *Knight v Corrections Victoria* [2010] VSC 338, [50].

<sup>25</sup> Section 50(1)(b).

<sup>26</sup> Section 52(5).

<sup>27</sup> Section 50(3FA).