

Notice of Decision and Reasons for Decision

Applicant:	'FX7'
Agency:	Victorian Building Authority
Decision date:	15 May 2025
Exemptions and provision considered:	Sections 30(1), 33(1), 25
Citation:	'FX7' and Victorian Building Authority (Freedom of Information) [2025] VICmr 43 (15 May 2025)

FREEDOM OF INFORMATION – complaint – running sheet – record keeping – names of agency officers

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 in the document is exempt under sections 30(1) and 33(1), I have decided to release further information in the document to the Applicant.

A marked-up copy of the document showing exempt information in accordance with my decision has been provided to the Agency.

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

15 May 2025

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency seeking access to a copy of the Agency's running sheet for a specified complaint file. Their request followed a previous FOI decision made by the Agency concerning the same document.
2. The Agency located one document in response to the request and granted access to it in part, exemption information under sections 30(1) 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. I have examined a copy of the document subject to review.
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.

OVIC staff's initial assessment

10. During the review, an OVIC officer provided the Agency with their initial assessment concerning the likely decision that would be made. The OVIC officer advised the Agency that information that recounts conversations, or that details complaints made by the Applicant, would not be exempt under section 30(1). Further, the OVIC officer advised the Agency that an Agency officer's name would not be found exempt under section 33(1) in the circumstances. The Agency was invited to respond to OVIC's staff's initial assessment and to consider making a

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

fresh decision if the Agency agreed with the OVIC officer's assessment.

11. The Agency made a submission in response, providing further reasoning to uphold its decision which I have carefully considered.

Review of exemptions

Section 30(1) – Internal working documents

12. Section 30(1) exempts documents that contain opinion, advice or recommendation, or consultation or deliberation, where disclosure would be contrary to the public interest. A document is not exempt simply because it is an internal working document.²
13. To be exempt under section 30(1), three conditions must be satisfied:
 - (a) the document or information is matter in the nature of:
 - (i) opinion, advice or recommendation prepared by an agency officer or a Minister; or
 - (ii) consultation or deliberation that has taken place between agency officers or Ministers; and
 - (b) the matter was created during the deliberative process of an agency, Minister, or the government's functions; and
 - (c) disclosure of the matter would be contrary to the public interest.
14. There are four circumstances where section 30(1) does not apply:
 - (a) documents required to be made available for inspection and purchase under section 8;
 - (b) purely factual information;
 - (c) certain documents relating to adjudicative functions; and
 - (d) documents more than 10 years old.
15. For more information about section 30 see the FOI Guidelines.³

Does the document contain opinion, advice or recommendation, or consultation or deliberation?

16. It is not necessary for the document to be opinion, advice or recommendation. The issue is whether release of the document would disclose matter of that nature.⁴
17. As communicated to the Agency during this review, certain information exempted by the Agency is factual. Factual information is information without any opinion or inference – it is information that is objectively the same for any individual.

² *Graze v Commissioner of State Revenue* [2013] VCAT 869, 25.

³ <https://ovic.vic.gov.au/freedom-of-information/foi-guidelines/section-30/>.

⁴ *Mildenhall v Department of Education* (1998) 14 VAR 87.

18. In response to OVIC's initial assessment, the Agency submitted:

The document requested (the running sheet) contains non-factual material in the form of internal opinions and advice that was interpreted and developed for the VBA's decision-making regulatory functions. This was developed from consulting and deliberating information available to the VBA to provide a summary of the complaint and assist the VBA to review and make a decision. To uphold confidentiality and maintain the integrity and effectiveness of VBA's statutory processes, this material has been redacted...

19. While I note the Agency's view, I am satisfied the following information in the document is factual information where section 30(3) applies:
- (a) recounting a conversation with the Applicant, including recounting what was stated by the Applicant; and
 - (b) the overview of claims made on page 6.
20. With respect to the information on page 6, I do not accept on the information before me that it was developed through consultation and deliberation between Agency officers.
21. As such, I consider most information exempted by the Agency under section 30(1) is not exempt under section 30(1) due to section 30(3).
22. My consideration of the remaining limbs of section 30(1) only apply to the last line of text on page 3 and the second sentence on page 4, because that is the only information in the document that is matter in the nature of opinion.

Was the matter created during the deliberative process of an agency, Minister, or the government's functions?

23. Where the document contains opinion, I am satisfied the information was created during the deliberative processes of the Agency, being its management of a complaint.

Would disclosure of the document be contrary to the public interest?

24. In deciding whether disclosure of the information would be contrary to the public interest, I have given weight to the following relevant factors:⁵
- (a) the right of every person to gain access to documents under the FOI Act;
 - (b) the sensitivity of the issues involved and the broader context of how the document was created;
 - (c) the stage of a decision or policy development at the time the communications were made;
 - (d) whether disclosure of the document would be likely to inhibit communications between agency officers that are essential for the agency to make an informed and well-

⁵ See <https://ovic.vic.gov.au/freedom-of-information/foi-guidelines/section-30/#disclosure-would-be-contrary-to-the-public-interest>.

considered decision or for those officers to properly participate in a process of the agency's functions (such as an audit or investigation, regulatory or law enforcement function);

- (e) whether disclosure of the document would give merely a part explanation, rather than a complete explanation, for the taking of a particular decision or the outcome of a process, but only where the agency would not otherwise be able to explain upon disclosure of the document;
- (f) the likelihood that disclosure would inhibit the independence of officers, including their ability to conduct proper research and make detailed submissions;
- (g) the public interest in the community being better informed about an agency's deliberative, consultative and decision-making processes;
- (h) the public interest in government transparency and accountability by enabling scrutiny or criticism of decisions and the decision-making process and building the community's trust in government and its decision-making processes; and
- (i) whether there is controversy or impropriety around the decision or the decision-making process.

25. The Agency made the following submission:

disclosure of this content would be contrary to the public interest due to several key considerations:

- Preserving confidentiality in regulatory decision-making.
- Ensuring the VBA is judged on final decisions, not preliminary considerations.
- Protecting decision-making and investigative processes from undue interference.
- Preventing disclosure that could compromise future regulatory effectiveness by exposing investigative methodologies.

26. I do not agree these key considerations raised by the Agency apply to the content in dispute in this particular case for the following reasons:

- (a) The information does not concern the Agency officer in a decision-making capacity. Rather, it is their opinions regarding a conversation with the Applicant.
- (b) The information does not concern preliminary considerations, as the conversation followed an outcome of an assessment by a technical expert. The opinion also does not concern the complaint itself.
- (c) There is no information before me to be satisfied that disclosure would expose the Agency to undue influence in relation to its decision making or investigative practices.
- (d) There is no information before me to be satisfied that disclosing the opinion would compromise the effectiveness of the Agency's regulatory or investigative functions.

27. Nevertheless, I am satisfied that disclosing certain information would be contrary to the public interest. This is because the opinion is clearly personal and not intended to be a formal opinion in relation to the complaint. Further, there is a public interest in allowing Agency officers to make thorough and fulsome file notes, and disclosing the record in full in this instance could inhibit Agency officers from making fulsome records in the future which could negatively impact the accuracy of record-keeping.
28. Therefore, I am satisfied that a small amount of information in the document is exempt under section 30(1).

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

29. Section 33(1) protects an individual's privacy where their right to privacy outweighs the public interest in disclosing their information.⁶ This will only occur when disclosing the individual's personal affairs information is unreasonable.
30. A document or information is exempt under section 33(1) if two conditions are satisfied:
- (a) the document or information relates to the 'personal affairs' of a natural person (living or deceased); and
 - (b) disclosure of that personal affairs information is unreasonable in all the circumstances.
31. For more information about section 33(1) see the FOI Guidelines.⁷

Does the document contain personal affairs information of other individuals?

32. The personal affairs information exempted by the Agency concerns Agency officers who were involved in the management of the Applicant's complaint. The Agency also exempted direct contact details of the person subject of the complaint, and the name of another person.

Consultation

33. The Agency is required to consult with affected third parties, unless it is not reasonably practicable to do so.
34. The Agency did not consult with all affected third parties. It consulted with one affected third party when it handled a related FOI request.

Would disclosure of the personal affairs information be unreasonable?

35. In determining whether disclosure of the personal affairs information would be unreasonable in the circumstances, I have considered the following factors:⁸
- (a) the nature of the personal affairs information;

⁶ *Victoria Police v Marke* [2008] VSCA 218.

⁷ <https://ovic.vic.gov.au/freedom-of-information/foi-guidelines/section-33/>

⁸ See <https://ovic.vic.gov.au/freedom-of-information/foi-guidelines/section-33/#would-disclosure-be-unreasonable>.

- (b) the circumstances in which the information was obtained;
 - (c) the extent to which the information is available to the public;
 - (d) the Applicant's interest in the information;
 - (e) whether any public or important interest would be promoted by release of the information;
 - (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.
36. With respect to the names of the Agency officers who were involved in the management of the complaint, I have considered the following:
- (a) the Agency officers both had substantial involvement in the management of the complaint;
 - (b) they both had direct contact with the Applicant via telephone, and at least one of the Agency officers had direct contact with the Applicant via email. Therefore, the Applicant is already aware of their identity and knows the full name of at least one of the Agency officers;
 - (c) there is nothing sensitive in relation to their involvement in managing the complaint, based on the information before me;
 - (d) the Agency officers were acting in their professional capacity;
 - (e) their names are recorded in the document for the purpose of the Agency's record-keeping practices;
 - (f) disclosure is unlikely to have a substantial impact on the Agency officers, given the nature of the information in the document;
 - (g) the disclosure of their names will only promote a private interest held by the Applicant, and not a public interest;
 - (h) the document can be understood without disclosure of the names;
 - (i) there is no information before me regarding the Applicant's intention for seeking the personal affairs information; and
 - (j) there is no information before me to suggest disclosure would result in harm to their life or physical safety, which is a mandatory consideration.
37. On balance of the above factors, I am satisfied that it would not be unreasonable to disclose the names of the Agency officers.

38. However, I am satisfied that it would be unreasonable to disclose the direct contact details of the person subject to the complaint, and the name of another person, having considered the following:
- (a) the document was created following a complaint made by the Applicant;
 - (b) disclosing the information does not promote a public interest; and
 - (c) the document can be understood without disclosure of this personal affairs information.
39. The Agency did not claim that the name of the person, who is subject to the complaint, as exempt under section 33(1). For completeness, I do not consider their name is exempt, as it is reasonably likely known by the Applicant in the circumstances.
40. Accordingly, I am satisfied certain information in the document is exempt under section 33(1).

Section 25 – Deletion of exempt or irrelevant information

41. 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.
42. Deciding whether it is ‘practicable’ to delete exempt or irrelevant information requires an agency or Minister to consider:
- (a) the effort involved in making the deletions from a resources point of view;⁹ and
 - (b) the effectiveness of those deletions – that is, whether the edited document still has meaning.¹⁰
43. The document includes the name of an Agency officer at the bottom of each page, which is irrelevant as they were not involved in the handling of the complaint.
44. I have considered the effect of deleting exempt and irrelevant information from the document. In my view, it is practicable for the Agency to delete the exempt and irrelevant information, because it would not require substantial time and effort, and the edited documents would retain meaning.

Conclusion

45. On the information before me, I am satisfied certain information in the document is exempt from release under sections 30(1) and 33(1).

⁹ *Mickelburgh v Victoria Police* [2009] VCAT 2786, [31]; *The Herald and Weekly Times Pty Limited v The Office of the Premier (General)* [2012] VCAT 967, [82].

¹⁰ *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.

- 46. As I am satisfied it is practicable to provide the Applicant with an edited copy of the document with exempt and irrelevant information deleted in accordance with section 25, access is granted in part.
- 47. A marked-up copy of the document indicating exempt and irrelevant information in accordance with my decision has been provided to the Agency.

Timeframe to seek a review of my decision

- 48. If either party to this review is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.¹¹
- 49. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹²
- 50. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹³
- 51. 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.
- 52. 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.¹⁴

Third party review rights

- 53. As I have determined to release a document that contains the personal affairs information of persons other than the Applicant, if practicable, I am required to notify those persons of their right to seek review by VCAT of my decision within 60 days from the date they are given notice.¹⁵
- 54. In this case, I am satisfied it is practicable, with assistance from the Agency, to notify the relevant third parties of their review rights. As I do not have the contact details of the Agency officers, I request the Agency to provide the notification letters addressed to the third parties, enclosed with my decision, on my behalf as soon as practicable.
- 55. OVIC will notify the other relevant third party as soon as practicable.

When this decision takes effect

- 56. My decision does not take effect until the third parties' 60 day review period expires. If a review application is made to VCAT, my decision will be subject to any VCAT determination.

¹¹ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

¹² Section 52(5).

¹³ Section 52(9).

¹⁴ Sections 50(3F) and 50(3FA).

¹⁵ Sections 49P(5), 50(3) and 52(3).