

Notice of Decision and Reasons for Decision

Applicant:	'GA3'
Agency:	City of Whitehorse
Decision date:	30 June 2025
Exemptions and provision considered:	Sections 33(1), 35(1)(b), 25
Citation:	'GA3' and City of Whitehorse (Freedom of Information) [2025] VICmr 66 (30 June 2025)

FREEDOM OF INFORMATION – complaints – local government – engineering reports – dispute – personal affairs information – material obtained in confidence – council documents

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 and no further information is to be released.

Please refer to page 7 for information about review rights through the Victorian Civil and Administrative Tribunal (**VCAT**).

My reasons for decision follow.

Penny Eastman
Public Access Deputy Commissioner

30 June 2025

Reasons for Decision

Background to review

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

“Documents dated/created between [dates]:

I would like the engineers/engineering reports including third party and photos, which were provided to the Whitehorse Council by [named person] [phone number] of [an address in Melbourne], relating to Building Notice [reference] for

[an address in Melbourne]

 - Yes, I confirm the above interpretation
 - Yes, I wish to exclude personal affairs information
 - Yes, I give Council permission to advise third parties that I am seeking access
 - I have been requested by OVIC to make this application, Office of the Victorian Information Commission”.
2. The Agency identified one document falling with the terms of the Applicant’s request and refused access to it in full under sections 33(1) and 35(1)(b). 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.

Initial view

9. On [date], the Applicant was provided an initial view by OVIC staff that the document would likely be held to be exempt in full under sections 33(1) and 35(1)(b).
10. The Applicant was invited to agree to withdraw their application or seek a formal written notice of decision. The Applicant was also invited to provide any further information they would like to be considered prior to the decision on review being made.
11. On the same date, the Applicant replied that they would like to proceed with a formal review. The Applicant did not provide any further information for OVIC's consideration.

Review of exemptions

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

12. Section 33(1) protects an individual's privacy where their right to privacy outweighs the public interest in disclosing their information.¹ This will only occur when disclosing the individual's personal affairs information is unreasonable.
13. 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)
 - (b) disclosure of that personal affairs information is unreasonable in all the circumstances.
14. For more information about section 33(1) see the FOI Guidelines.²

Does the document contain personal affairs information of other individuals?

15. The concept of personal affairs information is broad. Information will relate to the personal affairs of a person if it 'concerns or affects that person as an individual'.³ This includes information relating to health, private behaviour, home life, or personal or family relationships of individuals.⁴
16. A document will indirectly disclose personal affairs information if it contains information from which any person's identity, address or location can reasonably be determined. This means that a document can be exempt under section 33(1) where the document itself does not contain personal affairs information, but its disclosure would reveal personal affairs information.
17. I note the Applicant agreed to exclude personal affairs information from the document. However, having considered the content of the document, which is a covering email and a report on a shared fence with a third party property owner, I am satisfied the document in its entirety concerns the personal affairs information of a third party. This is because as well as directly identifying information, it relates to information that most people would find personal

¹ *Victoria Police v Marke* [2008] VSCA 218.

² <https://ovic.vic.gov.au/freedom-of-information/foi-guidelines/section-33/>.

³ *Hanson v Department of Education & Training* [2007] VCAT 123.

⁴ *Re F and Health Department* (1988) 2 VAR 458, quoted in *RFJ v Victoria Police FOI Division* [2013] VCAT 1267 [103], [109].

and sensitive, being their home. I therefore consider the Applicant is seeking personal affairs information and have proceeded with the review on that basis.

Would disclosure of the personal affairs information be unreasonable?

18. In determining whether disclosure of the personal affairs information would be unreasonable in the circumstances, I have considered the following factors:⁵
 - (a) the nature of the personal affairs information
 - (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
 - (g) whether disclosure of the information would or would be reasonably likely to endanger the life or physical safety of any person.
19. I have decided it would be unreasonable to release the document for the following reasons:
 - (a) The document is an email and a report prepared by a contractor engaged by a third party. The information was provided to the Agency in the course of carrying out its regulatory functions in relation to building matters.
 - (b) As described above, I consider the information is sensitive and personal as it relates to a third party's home.
 - (c) While I note some of the information would be known to the Applicant or other members of the public where it is visible from the street or neighbouring properties, I consider the information specifically sought by the Applicant is not information available to the public.
 - (d) The Applicant seeks access to the document in response to a building notice and enforcement action issued by the Agency. The Applicant is of the opinion that the Agency requires them to undertake the replacement of their retaining wall without providing supporting evidence. I acknowledge the Applicant's interest in obtaining access to the information. However, this factor must be weighed against other relevant factors.
 - (e) While I note the Applicant's interest in obtaining access to information that concerns the adjoining wall with the property next to theirs, I do not consider the public interest would be promoted by the release of the requested document.

⁵ See <https://ovic.vic.gov.au/freedom-of-information/foi-guidelines/section-33/#would-disclosure-be-unreasonable>.

- (f) I consider that in similar cases the public interest may lie in favour of disclosure of information that supports an Agency [building notice] decision. However, in this instance there are other factors that I must consider, such as the sensitivity of the specific circumstances of this matter.
 - (g) In this instance, weighing all the above factors, I have decided that the third party's privacy outweighs the public interest in disclosure.
18. As I consider disclosure of the personal affairs information in the document would be unreasonable to release, the document is exempt under section 33(1).

Section 35(1)(b) – Information obtained in confidence

19. A document may be exempt under section 35(1)(b) if two conditions are satisfied:
- (a) disclosure would divulge information or matter:
 - (i) communicated in confidence
 - (ii) by or on behalf of a person or a government to an agency or a Minister
 - (b) disclosure would be contrary to the public interest because the disclosure would be reasonably likely to impair the ability of an agency or a Minister to obtain similar information in the future.

Was the information obtained in confidence?

20. Whether information was communicated in confidence is a question of fact,⁶ determined from the perspective of the communicator.⁷
21. Having considered the content and context of the document, I am satisfied the third party who communicated information to the Agency did so in a voluntary basis where confidentiality could be implied.

Would disclosure impair the ability of the Agency to obtain similar information?

22. The term 'impair' is not defined in the FOI Act. However, case law suggests:
- (a) the degree of impairment must go beyond a trifling or minimal impairment⁸
 - (b) there must be an actual impairment to the ability of the agency to obtain similar information in the future⁹
 - (c) it is not enough that individuals would be less candid than they otherwise might be¹⁰ or

⁶ *Ryder v Booth* [1985] VR 869, 883.

⁷ *XYZ v Victoria Police* [2010] VCAT 255, [265]; *Barling v Medical Board of Victoria* (1992) 5 VAR 542, 561-562.

⁸ *Ryder v Booth* [1985] VR 869, 880.

⁹ *Birnbauer & Davies v Inner & Eastern Health Care Network* [1999] VCAT 1363, [68] referring to *Ryder v Booth* [1985] VR 869

¹⁰ *Birnbauer & Davies v Inner & Eastern Health Care Network* [1999] VCAT 1363, [68]; approved in *Smeaton v Victorian WorkCover Authority* [2012] VCAT 1549, [69].

would feel resentment at having their confidence betrayed¹¹

- (d) the necessary level of impairment will be made out if a significant minority of persons in the relevant group would be firmly resistant to providing similar information in the future¹²
 - (e) it is the agency that must be impaired from receiving information, not simply a reluctance on the part of a supplier to provide information¹³
 - (f) the existence of a statutory duty to provide information does not necessarily exclude the possibility that disclosure would be reasonably likely to impair an agency's ability to obtain similar information in the future, particularly where disclosure might impact the quality and quantity of any future information provided.¹⁴ In comparison, an agency will not be impaired from obtaining a specific type of information in future, if there is legislation which compels a person to provide this type of information to the agency.¹⁵
23. I again acknowledge the Applicant's interest in receiving access to the document under the FOI Act. However, I am of the view that if such a document was released under the FOI Act that there is a real possibility that the Agency would be impaired from obtaining similar information in the future, noting the information was communicated voluntarily and with an expectation of confidentiality.
24. I consider there is a public interest in ensuring that people are uninhibited from making complaints, so that the Agency can serve its constituents and meet its regulatory obligations.
25. I am therefore satisfied the document is also exempt under section 35(1)(b).

Section 25 – Deletion of exempt or irrelevant information

26. 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.
27. 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 view¹⁶ and

¹¹ *Sifredi v Medical Practitioners Board* [1999] VCAT 87 (affirmed on appeal *Medical Practitioners Board of Victoria v Sifredi* [2000] VSC 33);

¹² *Sifredi v Medical Practitioners Board* [1999] VCAT 87 (affirmed on appeal *Medical Practitioners Board of Victoria v Sifredi* [2000] VSC 33).

¹³ *Kosky v Department of Human Services* [1998] VCAT 290, [22].

¹⁴ See *Thwaites v Department of Health and Community Services* (1995) 8 VAR 361, 370; *Woodford v Ombudsman* [2001] VCAT 721, [99]-[101].

¹⁵ *Barling v Medical Board (Vic)* (1992) 5 VAR 542, 565.

¹⁶ *Mickelborough 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].

- (b) the effectiveness of those deletions – that is, whether the edited document still has meaning.¹⁷

28. I have considered the effect of deleting exempt information from the document. In my view, it is not practicable for the Agency to delete the exempt information, because deleting the exempt information would render the document meaningless and would not contain the information the Applicant is specifically seeking.

Conclusion

29. On the information before me, I am satisfied the document is exempt from release under sections 33(1) and 35(1)(b).
30. As I am satisfied it is not practicable to provide the Applicant with an edited copy of the document with exempt information deleted in accordance with section 25, access is refused in full.

Timeframe to seek a review of my decision

31. If the Applicant is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.¹⁸
32. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹⁹
33. 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.
34. 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.²⁰

¹⁷ *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.

¹⁸ Section 50(1)(b).

¹⁹ Section 52(5).

²⁰ 50(3FA).