

## Notice of Decision and Reasons for Decision

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Applicant:	'GE1'
Agency:	Department of Education
Decision date:	5 September 2025
Exemptions and provision considered:	Sections 30(1), 33(1), 35(1)(b), 25
Citation:	'GE1' and Department of Education (Freedom of Information) [2025] VICmr 98 (5 September 2025)

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FREEDOM OF INFORMATION – preliminary assessment report – workplace investigation – workplace review – internal report – prepared by a consultant

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 and more information is to be released.

A marked-up copy of the document showing exempt or irrelevant 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**

5 September 2025

## Reasons for Decision

### Background to review

1. The Applicant's request sought access to:
  1. any communication book/diary between myself and [a specified school]
  2. a copy of any reports provided by [an external party] to the Department of Education between [date range]. I am referring to an investigation and subsequent reports into [the school].
2. The Agency located 1 document in response to point 2 of the Applicant's request, which is a preliminary assessment report in relation to concerns raised in relation to a school.<sup>1</sup> The Agency decided to grant access to the document in part under sections 30(1), 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. The Applicant advised OVIC that they do not require personal affairs information, such as names, phone numbers and email addresses.
7. I have considered relevant 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.
10. 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'.<sup>2</sup> 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.

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<sup>1</sup> The Agency's decision letter refers to 2 documents, counting the preliminary assessment report and its annexure as separate documents. For the purposes of my review, the report and annexure are a single document.

<sup>2</sup> *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577, [591].

## Review of exemptions

### *Section 30(1) – Internal working documents*

11. 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.<sup>3</sup>
12. 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
  - (b) the matter was created during the deliberative process of an agency, Minister, or the government's functions
  - (c) disclosure of the matter would be contrary to the public interest.
13. 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
  - (d) documents more than 10 years old.
14. The term 'officer' is defined in section 5(1). It includes independent contractors, consultants and legal advisers engaged by an agency to carry out work or provide services.<sup>4</sup>
15. For more information about section 30 see the FOI Guidelines.<sup>5</sup>

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

16. The document was prepared by an external consultant engaged by the Agency. The document is a preliminary assessment report in relation to a number of concerns that had been raised in relation to a school. The annexure contains a summary of the concerns that were raised and the consultant's recommendations.

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<sup>3</sup> *Graze v Commissioner of State Revenue* [2013] VCAT 869, 25.

<sup>4</sup> *Mees v University of Melbourne (General)* [2009] VCAT 782, [31].

<sup>5</sup> <https://ovic.vic.gov.au/freedom-of-information/foi-guidelines/section-30/>.

17. I am satisfied the document includes information that is in the nature of opinion, advice and recommendation.

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

18. I am satisfied the information was created during the deliberative processes of the Agency, specifically, ensuring that it has a safe and productive environment for its employees and students.

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

19. In deciding whether disclosure of the information would be contrary to the public interest, I have given weight to the following relevant factors:<sup>6</sup>
- (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 at the time the document was 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-considered decision or for those officers to properly participate in a process of the agency's functions
  - (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
  - (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
  - (i) whether there is controversy or impropriety around the decision or the decision-making process.
20. On careful consideration, I am satisfied that disclosing certain information in the document would be contrary to the public interest for the following reasons:

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<sup>6</sup> See <https://ovic.vic.gov.au/freedom-of-information/foi-guidelines/section-30/#disclosure-would-be-contrary-to-the-public-interest>.

- (a) The document was prepared during a review into workplace issues, and the assessment examined the individual experiences of the participants regarding their workplace environment. I am satisfied the broader context to which the document relates is sensitive.
  - (b) The purpose of the report was to allow the Agency to consider and deliberate any findings and recommendations of the consultant. The assessment and recommendations set out in the document does not necessarily reflect the views of the Agency, and the recommendations may not have ultimately been accepted or adopted by the Agency. As such, disclosing the document could mislead the Applicant given they do not have further contextual information about the Agency's actual deliberation of the consultant's findings and recommendations.
  - (c) The assessments and recommendations are closely linked to information that was provided by the participants. I consider external review processes conducted by consultants for agencies rely on free and fulsome information being provided by review participants. In this case, I am of the view the participants would have provided information to the external consultant on the basis it would be held in confidence or be utilised for internal processes of the Agency to address any workplace issues. Given the nature of disclosure under the FOI Act, which is unrestricted and unconditional, I do not consider the participants would have contemplated or been as engaged in the process had they known the report would be disclosed under the FOI Act or otherwise be available publicly.
  - (d) In my view, it is important that workplace reviews can obtain the unvarnished views of participants. While the Applicant is not seeking access to identifying information, I consider given the small number of the participants involved, the participants could be reidentified, particularly by people with knowledge of the workplace. I consider disclosure of the exempted information would mean that participants would be less likely to provide their fulsome views in the future. This in turn could have a significant impact on the Agency and its ability to provide a safe and productive workplace and learning environment for its employees and students.
  - (e) It is important that public sector agencies can undertake a thorough and considered review processes in relation to workplace incidents, culture and conflict. Without an open flow of relevant and sufficient information, such workplace reviews are unlikely to be able to obtain and clearly identify and advise on all relevant matters. Such an outcome, in my view, may result in flawed or incomplete review findings which would be contrary to the public interest.
  - (f) While the report was created in [year], I consider it remains sensitive due to the small number of participants involved in the review, the issues that were raised, and some participants may still be employed by the Agency.
21. However, I have decided to release a small amount of additional information in the document where it reveals instructions to the consultant, broad themes or topics under consideration and the recommendations concerning communicating the outcome of the review to the participants. The nature of this information is distinguishable from the information discussed above.

22. Accordingly, I am satisfied that certain information in the document is exempt from release under section 30(1).

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

23. Section 33(1) protects an individual's privacy where their right to privacy outweighs the public interest in disclosing their information.<sup>7</sup> This will only occur when disclosing the individual's personal affairs information is unreasonable.
24. 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.
25. While the Applicant advised they do not want personal affairs information, such as names, telephone numbers and email addresses, the document contains information that concerns and affects third parties. As such, I must consider section 33(1).

***Does the document contain personal affairs information of other individuals?***

26. 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'.<sup>8</sup> This includes information relating to health, private behaviour, home life, or personal or family relationships of individuals.<sup>9</sup>
27. 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.
28. Personal affairs information can be revealed or indirectly disclosed by connecting or linking the information in the disclosed document with other information available to the applicant.<sup>10</sup>
29. The document contains directly identifying information about third parties, such as names. I am satisfied such information is irrelevant information for the purposes of this review.
30. However, there is other personal affairs information in the documents, including detailed information provided by participants in relation to their workplace and colleagues.
31. I am also satisfied there is potential for the identity of the participants and other individuals to be deduced from information in the document, as opinions and experiences of the participants

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<sup>7</sup> *Victoria Police v Marke* [2008] VSCA 218.

<sup>8</sup> *Hanson v Department of Education & Training* [2007] VCAT 123.

<sup>9</sup> *Re F and Health Department* (1988) 2 VAR 458, quoted in *RFJ v Victoria Police FOI Division* [2013] VCAT 1267 [103], [109].

<sup>10</sup> *Harrison v Victoria Police* [2022] VCAT 280, [153].

involved could be attributed to the small pool of participants and the opinions provided are specific to individuals and issues.

*Would disclosure of the personal affairs information be unreasonable?*

32. In determining whether disclosure of the personal affairs information would be unreasonable in the circumstances, I have considered the following factors: <sup>11</sup>
- (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.
33. I have considered the following:
- (a) The review conducted by the external consultant relied on the voluntary provision of free and fulsome information from participants. In this case, I accept the participants provided information to the consultant on the basis they would not be named or identified in the document, and the specific nature of the information they provided would be held in confidence given the circumstances in which it was communicated.
  - (b) The document contains highly sensitive information provided by participants about their colleagues and other individuals.
  - (c) I consider most participants would be reasonably likely to object to the disclosure of their personal affairs information given the sensitive nature of the information within the document.
  - (d) There is an interest in Agency officers being sufficiently comfortable and confident to voluntarily participate in a sensitive workplace review. I am satisfied disclosure of the document in full would undermine the confidentiality of participants and their confidence in the conduct and integrity of similar future reviews.
  - (e) The personal affairs information is not in the public domain.
  - (f) While there is no information before me to suggest the information will be widely disseminated by the Applicant, I consider it is reasonably likely the personal privacy of

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<sup>11</sup> See <https://ovic.vic.gov.au/freedom-of-information/foi-guidelines/section-33/#would-disclosure-be-unreasonable>.

the third parties named in the documents will be impacted should their personal affairs information be disclosed.

- (g) Section 33(2A) requires me to consider whether disclosing a third party's personal affairs information would or would be reasonably likely to endanger the life or physical safety of any person. In this case, there is no information before me to suggest this is a relevant factor.

- 34. On consideration of these factors, I am satisfied that disclosing the personal affairs information would be unreasonable in the circumstances and therefore, personal affairs information is exempt from release under section 33(1).

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

- 35. 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?*

- 36. Whether information was communicated in confidence is a question of fact,<sup>12</sup> determined from the perspective of the communicator.<sup>13</sup>
- 37. Generally, section 35(1) only applies to information communicated from an external source. It usually does not apply to information generated by the agency or its own officers. In very limited circumstances, section 35 may apply to particularly sensitive and confidential information communicated to an agency by its own officers.<sup>14</sup> For example, in the context of internal complaints and investigations. In these situations, the officer's position is analogous to that of an outside source.<sup>15</sup>
- 38. The document contains information that the review participants communicated to the consultant who prepared the report. It can be implied that the participants provided information to the consultant in circumstances in which a certain degree of confidentiality can reasonably be implied based on the nature and context of the review.

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<sup>12</sup> *Ryder v Booth* [1985] VR 869, 883.

<sup>13</sup> *XYZ v Victoria Police* [2010] VCAT 255, [265]; *Barling v Medical Board of Victoria* (1992) 5 VAR 542, 561-562.

<sup>14</sup> *Sportsbet v Department of Justice* [2010] VCAT 8, [77]-[78], referring to *Birnbaauer v Inner & Eastern Health Care Network* (1999) 16 VAR 9, 17.

<sup>15</sup> *Sportsbet v Department of Justice* [2010] VCAT 8, [77].



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

39. 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 impairment<sup>16</sup>
  - (b) there must be an actual impairment to the ability of the agency to obtain similar information in the future<sup>17</sup>
  - (c) it is not enough that individuals would be less candid than they otherwise might be<sup>18</sup> or would feel resentment at having their confidence betrayed<sup>19</sup>
  - (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 future<sup>20</sup>
  - (e) it is the agency that must be impaired from receiving information, not simply a reluctance on the part of a supplier to provide information<sup>21</sup>
  - (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.<sup>22</sup> 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.<sup>23</sup>
40. I consider workplace reviews are not uncommon and rely on voluntary participation, in circumstances where participants are almost always provided with assurances of confidentiality in exchange for relevant information to inform a workplace review. I also acknowledge the fine balance between encouraging the voluntary participation in exchange for assuring a certain degree of participants' confidentiality with the need to collate and report on evidence obtained and make appropriate findings and recommendations.
41. I accept the document is written in such a way to protect the identity and confidentiality of most of the participants; however, the pool of participants who were interviewed was small,

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<sup>16</sup> *Ryder v Booth* [1985] VR 869, 880.

<sup>17</sup> *Birnbauer & Davies v Inner & Eastern Health Care Network* [1999] VCAT 1363, [68] referring to *Ryder v Booth* [1985] VR 869

<sup>18</sup> *Birnbauer & Davies v Inner & Eastern Health Care Network* [1999] VCAT 1363, [68]; approved in *Smeaton v Victorian WorkCover Authority* [2012] VCAT 1549, [69].

<sup>19</sup> *Sifredi v Medical Practitioners Board* [1999] VCAT 87 (affirmed on appeal *Medical Practitioners Board of Victoria v Sifredi* [2000] VSC 33);

<sup>20</sup> *Ibid.*

<sup>21</sup> *Kosky v Department of Human Services* [1998] VCAT 290, [22].

<sup>22</sup> See *Thwaites v Department of Health and Community Services* (1995) 8 VAR 361, 370; *Woodford v Ombudsman* [2001] VCAT 721, [99]-[101].

<sup>23</sup> *Barling v Medical Board (Vic)* (1992) 5 VAR 542, 565.

and in such circumstances, their identity could be inferred by persons who are aware of the issues discussed.

42. The need to ensure candour and honesty in the provision of feedback by participants in workplace reviews is of crucial importance where the results collected will be used to identify issues and inform relevant recommendations.
43. In my view, it would be contrary to the public interest to disclose specific information provided by participants in the context of workplace reviews. If this information is disclosed, it may significantly impact their willingness to participate in any future review, staff survey or interview on the grounds that the information they provide to the Agency, or an external consultant may be disclosed under the FOI Act, and their identity may be discernible based on particular information or comments made and recorded.
44. Accordingly, I am satisfied the certain information in the document is exempt from release under section 35(1)(b).

#### ***Section 25 – Deletion of exempt or irrelevant information***

45. 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.
46. 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<sup>24</sup> and
  - (b) the effectiveness of those deletions – that is, whether the edited document still has meaning.<sup>25</sup>
47. Irrelevant information is information which is clearly outside the scope, or beyond the terms of the applicant’s request.
48. The Applicant advised OVIC during the review that they do not require personal information such as names, phone numbers and email addresses. This information is therefore irrelevant information for the purposes of my review.
49. I am satisfied it is practicable to edit the document to delete exempt and irrelevant information as it would not require substantial time and effort, and the edited document would retain meaning.

#### **Conclusion**

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<sup>24</sup> *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].

<sup>25</sup> *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.

50. On the information before me, I am satisfied certain information in the document is exempt from release under sections 30(1), 33(1) and 35(1)(b); however, I have decided to release additional information in the document.
51. A marked-up copy of the document indicating exempt or irrelevant information in accordance with my decision has been provided to the Agency.

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

52. If either party to this review is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.<sup>26</sup>
53. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.<sup>27</sup>
54. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.<sup>28</sup>
55. 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.
56. 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.<sup>29</sup>

#### **Third party review rights**

57. I have decided to release a small amount of information in the document that the Agency exempted from release under sections 33(1) and/or 35(1)(b).
58. I have decided that it is not practicable to notify any relevant third parties in relation to the release of this information because it either does not identify them, I do not have their contact information, or I consider notification would be an unwarranted intrusion given the content I have determined can be released.

#### **When this decision takes effect**

59. Although no third party is being notified of my decision, my decision nevertheless does not take effect until the associated 60-day review period expires.
60. If a review application is made to VCAT, my decision will be subject to any VCAT determination.

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<sup>26</sup> The Applicant in section 50(1)(b) and the Agency in section 50(3D).

<sup>27</sup> Section 52(5).

<sup>28</sup> Section 52(9).

<sup>29</sup> Sections 50(3F) and 50(3FA).