

Notice of Decision and Reasons for Decision

Applicant:	'GE7'
Agency:	Fire Rescue Victoria
Decision date:	16 October 2025
Exemptions and provision considered:	Sections 25A(5), 33(1), 35(1)(b)
Citation:	'GE7' and Fire Rescue Victoria (<i>Freedom of Information</i>) [2025] VICmr 104 (16 October 2025)

FREEDOM OF INFORMATION – conflict of interest – applicant did not advise the Agency whether they agree to edited copies – applicant advised OVIC they would accept edited copies – decision at OVIC based on information available at time of decision

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 differs from the Agency's decision.

I am not satisfied it is objectively apparent from the nature of the documents, as described in the Applicant's request, that all requested documents, if they exist, would be exempt in their entirety from release.

During my review, the Applicant confirmed they would accept edited copies of relevant documents. I have proceeded with my review based on this confirmation.

I am satisfied there is scope to provide an edited copy of a relevant document or documents, if they exist, with exempt or irrelevant information removed.

Accordingly, I am not satisfied the requirements for refusal to grant access to documents under section 25A(5) are met and the Agency is required to process the Applicant's request.

My reasons for decision follow.

Penny Eastman
Public Access Deputy Commissioner

Reasons for Decision

Background to review

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

All documents pertaining to the declaration of any conflict of interest (or pecuniary interest) by the Fire Rescue Victoria Executive Leadership Team (ELT) from [date].

2. The Agency decided that section 25A(5) applied to the request, that is, it refused to grant access to the documents requested without processing the request. This is because the Agency was satisfied all documents, should any exist, would be exempt under sections 33(1) and 35(1)(b). The Agency also advised the Applicant:

It has previously been held in Tribunal decisions that agencies are not required to provide partial access to documents if the Applicant has not indicated that they would wish to have access to an edited copy of the document.

I have decided that it would not be practicable for [Fire Rescue Victoria] FRV to provide you with edited copies of documents with exempt or irrelevant material deleted, even if you had sought partial access.

Review application

3. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse to grant access to documents.
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 all 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.

Review of section 25A(5)

8. Section 25A(5) provides an agency may refuse to grant access to documents without having identified the documents falling within the terms of the request if it is apparent from the nature of the request that all the requested documents would be exempt from release under the FOI Act, and there is no obligation to provide the applicant with partial access to one or more documents in accordance with section 25.
9. The power in section 25A(5) is carefully circumscribed. A decision maker must be satisfied of the following three elements, which operate to limit its application:

- (a) first, 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) second, it must be apparent all documents in the request are exempt
 - (c) third, it must be apparent from:
 - (i) the nature of the documents, as described in the request, that no obligation would arise under section 25 for the agency to grant access to an edited copy of a document or
 - (ii) the request or through consultation with the applicant that the person would not wish to have access to an edited copy of the document.¹
10. Section 25A(5) does not require an agency to identify any or all documents to which the request relates or to specify, in respect of each document, the relevant exemption under which a document is claimed to be exempt.
11. Accordingly, I am required to make my decision without having reviewed any of the requested documents, and in the absence of confirming whether any relevant documents exist.

First element – what is the essential character of the documents?

12. The Applicant is seeking access to a narrow, well defined set of documents. In most agencies the documents would be forms or templates setting out the name of the person to whom it relates and any conflicts of interests they have, or if they have no conflicts of interest to declare. Such declarations could also take the form of a memo or an email.
13. I am satisfied the nature of the requested documents is objectively apparent from the specific terms of the Applicant's request. Accordingly, I am satisfied the first limb of section 25A(5) is met.

Second element - would all documents, as described in the request, be exempt from release?

14. The Agency determined it was apparent that all the requested documents sought, should any exist, would be exempt from release under sections 33(1) and 35(1)(b).

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

15. Section 33(1) protects an individual's privacy where their right to privacy outweighs the public interest in disclosing their information.² This will only occur when disclosing the individual's personal affairs information is unreasonable.

¹ *Knight v Corrections Victoria* [2010] VSC 338.

² *Victoria Police v Marke* [2008] VSCA 218.

16. 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.
17. In its decision letter, the Agency states:
- The information contained in these documents include sensitive personal information such as financial matters and matters involving family members or associates. These documents also include information that could identify and disclose a person's address or location.
- The Victorian Public Sector Commission (VPSC) directs organisations like FRV to develop a conflict-of-interest policy which is consistent with the public sector values in section 7 of the *Public Administration Act 2004* and the employee code of conduct issued by the VPSC, in section 3.
- FRV must treat information in accordance with relevant laws and obligations, such as the *Privacy and Data Protection Act 2014* (Vic), the *Public Records Act 1973* (Vic) and the *Charter of Human Rights and Responsibilities Act 2006* (Vic). FRV does not share this information publicly.
18. I agree all documents responding to the terms of the request would contain personal affairs information. I also consider that some of the information may be unreasonable to release. However, without consideration of the contents of the documents I cannot be satisfied that all the information would be exempt. I also consider that, depending on the contents of those documents, there may be circumstances where disclosure would not be unreasonable.
19. I am therefore not satisfied that all documents falling within the terms of the request would be exempt under section 33(1).

Section 35 – Documents containing material obtained in confidence

20. Section 35 contains two exemptions that relate to information communicated in confidence by or on behalf of a person or a government to an agency or Minister.
21. In limited circumstances, section 35 may apply to particularly sensitive and confidential information communicated to an agency by its own officers.³ For example, in the context of internal complaints and investigations, or where misconduct or corruption is reported. In these situations, the officer's position is similar to that of an outside source.⁴
22. For more information about section 35, see the FOI Guidelines.⁵

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

23. 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

³ *Sportsbet v Department of Justice* [2010] VCAT 8, [77]-[78], referring to *Birnbaumer v Inner & Eastern Health Care Network* (1999) 16 VAR 9, 17.

⁴ *Sportsbet v Department of Justice* [2010] VCAT 8, [77].

⁵ <https://ovic.vic.gov.au/freedom-of-information/foi-guidelines/section-35/>.

- (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.
24. Whether information was communicated in confidence is a question of fact,⁶ determined from the perspective of the communicator.⁷
25. 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 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
26. In its decision letter, the Agency's decision maker states:

I have decided that section 35(1)(b) applies in conjunction with section 33. The information contained in the documents sought by the Request is communicated in confidence to FRV. Disclosure is contrary to the public interest as it could lead to confusion and ill-informed debate. Employees would not expect their declarations to be made publicly available.

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].

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

¹² *Ibid.*

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.

27. As described above, in certain limited circumstances, where information is sensitive, relating to for example an internal complaint or investigation, I can consider that information provided by internal staff members to an Agency was done so in confidence.
28. In this instance, I agree the information was provided in confidence as the information sought relates to individual's personal as well as professional life.
29. However, I do not accept disclosure will impair the provision of similar information in the future for the following reasons:
- (a) declaring conflicts of interest is core to public sector values
 - (b) I consider all public sector employees are aware of this
 - (c) while I note the case law above, that a statutory duty does not preclude the application of this exemption, in this case, given the type of information sought, I consider that an employee's obligations would mean that disclosure would not impair the Agency from obtaining similar information in the future
 - (d) I do not consider the impairment would apply to a significant minority of people, rather I consider that a significant minority would likely not object to disclosure of similar information in the interests of public sector transparency.
30. I am therefore, based on the information before me regarding the nature of the documents, not satisfied that they would be exempt in full under section 35(1)(b).

Third element – is there scope to provide an edited copy of the documents requested?

31. 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.

Did the Applicant agree to receive edited copies?

32. I note the Integrity and Oversight Committee of the Victorian Parliament (the **Committee**) recently commented on the broader issue of partial access under section 25 of the FOI Act. In its report following an inquiry into the operation of the FOI Act in Victoria, the Committee acknowledged OVIC's concerns that it was not appropriate that an applicant must explicitly indicate they want to receive edited copies or partial access to documents otherwise an agency can refuse access in full.¹⁶
33. The Committee further supported OVIC's position and advised when contemplating legislative reform it:
- ... considers that the Commonwealth approach—which requires agencies to provide an edited copy of a document to an applicant if reasonably practicable, unless the applicant has indicated that they do not want to receive it—should be followed.¹⁷

¹⁶ Integrity and Oversight Committee, *Inquiry into the operation of the Freedom of Information Act 1983 (Vic)* (Final Report, September 2024), 181-182.

¹⁷ Ibid, 182.

34. During the review my office requested the Agency provide copies of all correspondence between it and the Applicant.
35. In response I have been provided with the Applicant's request, in the form of an email sent directly to the Agency's FOI Unit, and the Agency's decision letter. The Agency confirmed that there was no further correspondence between the parties prior to the decision.
36. In its decision, the Agency argues that it is 'not required to provide partial access if the Applicant has not indicated that they would wish to have access to an edited copy of the document'. I note the Agency did not consult with the Applicant to seek their views.
37. In their review application to my office the Applicant advised that they agree to receiving copies of documents with exempt or irrelevant information deleted.
38. In its submission to my office, the Agency states:
- ...Further, the Commissioner is bound by the terms of the Request as it was before FRV – any subsequent statement by the applicant seeking to amend the Request must be disregarded by the Commissioner.
39. The Agency cites *Davies v Victoria Police* [2022] VCAT 713, [90]-[92]. In that decision President Justice Quigley states:
- Desire of the Applicant*
90. The Applicant's request for the documents did not confirm that access to an edited copy of the documents was sought. The Tribunal has previously found that this is enough to confirm that partial access is not sought.¹⁸
91. However, the Applicant subsequently advised OVIC that he was amenable to receiving an edited copy of the documents, and OVIC relied on this instruction¹⁹ (but ultimately found that partial access was not practicable).²⁰ The Respondent contends that the Applicant must be held to the terms of the original request, in that any decision by OVIC must be in relation to the original request.²¹
92. In this regard, the Respondent relied on the decision of *Victorian Legal Services Commissioner v Grahame (No 2)*,²² [Grahame (No. 2)] in which Member Tang of this Tribunal accepted a submission to this effect, despite there being no previous authority on the point. Whilst, as President of the Tribunal, I am not bound by that decision, I do find it persuasive. Freedom of information requests should be made with sufficient specificity to enable the agency at first instance (here, Victoria Police) to process the request appropriately.
93. Ultimately, however, the desire of the Applicant as to partial access does not matter in this case, for the reasons that follow in relation to whether access to an edited copy would be practicable.
40. As noted in paragraphs [92] and [93], while the member found the argument in *Grahame* (No. 2) persuasive, the issue was not decided as it was not important to the decision in that matter.

¹⁸ *Gullquist v Victorian Legal Services Commissioner* [2017] VCAT 764, [31].

¹⁹ Office of the Victorian Information Commissioner, 'Reasons for Decision', 19 October 2020, [23].

²⁰ *Ibid*, [24].

²¹ 'Statement of Legal Contentions of the Respondent', 25 May 2021, [47].

²² [2019] VCAT 1878.

41. I note in Grahame (No. 2) the issue of the applicant's request is discussed as follows:

Is it apparent that Mr Grahame would not wish to have access to an edited copy of the documents?

60. As noted above, the APADC [Acting Public Access Commissioner of OVIC] indicates in the Decision that Mr Grahame confirmed during the course of the review that he was willing to receive an edited copy of the report.

61. A question arises as to the relevance (or otherwise) of that information in the context of section 25A(5)(b) of the FOI Act, in circumstances where Mr Grahame did not appear at the hearing and so could not express a view one way or the other.

62. In response to my query on this point, Mr Batskos submitted that:

(a) We do not know the terms in which Mr Grahame indicated to the APADC that he was willing to receive an edited copy of the report.

(b) Even if Mr Grahame had appeared and confirmed that he was willing to receive an edited copy of the Report or edited copies of the other documents, it would be 'too late to do it today in [his] experience'.

(c) The position of Mr Grahame is the same as Mr Gullquist²³ (noting that at paragraph [31] of the decision in *Gullquist*, it was indicated that Mr Gullquist did not seek an edited copy of the relevant investigation documents).

(d) The APADC did not have jurisdiction and so the conversations between Mr Grahame and the APADC should not be taken into account. Further, any indication has to be to the 'decision maker' (ie. the VLSC).

63. Given that VCAT steps into the shoes of the decision maker when conducting a review, can take account of information up to the date of hearing and can inform itself as it sees fit, I do not accept the indication under section 25(c) has to be given to the original decision maker, and that it cannot be given at a hearing before VCAT. In the latter respect, I note that in *Brooks v Victoria Police*,²⁴ the applicant implicitly requested an edited copy of a document in his closing submissions, with no objection from the agency concerned.²⁵

64. I also do not accept that any asserted lack of jurisdiction on the part of the APADC (which I do not have to resolve) prevents VCAT taking notice of the indication given by Mr Grahame to the APADC.

65. Accordingly, what is known is that Mr Grahame confirmed he was content to receive an edited copy of the Report. However, we do not know (one way or the other) whether he is also content to receive edited copies of other documents sought in his (original) FOI request.

66. Nevertheless, section 25A(b)(ii) of the FOI Act requires it to be apparent from the request or from consultation that the person *would not wish* to have access to an edited copy of the document(s). There is nothing to suggest that this reflects Mr Grahame's state of mind (noting that the original request did not contain an indication that he would not accept edited copies, rather it was silent).

²³ *Gullquist v Victorian Legal Services Commissioner* (Review and Regulation) [2017] VCAT 764.

²⁴ [2018] VCAT 1833.

²⁵ *Ibid* [39]-[40].

67. It follows that, assuming editing is practicable, the power to refuse access under section 25A(5) of the FOI Act will not be enlivened.

42. I appreciate there are differing positions on this issue. However, in my view the above demonstrates:
- (a) VCAT makes its decisions based on the information available at the time of the hearing rather than at the time of the Agency's decision.
 - (b) VCAT may accept information taken from an OVIC decision that an applicant is willing to accept edited documents received during the course of an OVIC review where the applicant's original request was silent on the issue.
43. I therefore have decided that I am required to make a decision based on the information currently available. This information includes that the Applicant is willing to receive an edited copy of any documents falling within the terms of the request.

Is it practicable to delete irrelevant and exempt information?

44. I am satisfied, based on the information before me, that it would be practicable to delete irrelevant or exempt information from relevant documents that might exist. This is because I consider any irrelevant information or information exempt under sections 33(1) and/or 35(1)(b), should it exist, would be easily identifiable and deleting it would not be overly burdensome for the Agency.

Conclusion

45. In summary, I am not satisfied it is objectively apparent from the nature of the documents, as described in the Applicant's request, that all requested documents, if they exist, would be exempt in their entirety from release. Further, I am satisfied there is scope to provide an edited copy of any relevant documents and the Applicant has confirmed to me that they agree to accept such a copy.
46. The effect of my decision is that the Agency is required to make a new decision on the request without relying on section 25A(5).

Review rights

47. If the Agency is not satisfied with my decision, it is entitled to apply VCAT for it to be reviewed.²⁶
48. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.²⁷
49. 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.

²⁶ Section 50(3D).

²⁷ Section 52(9).