

## Notice of Decision and Reasons for Decision

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Applicant:	Metricon Homes Pty Ltd
Agency:	Campaspe Shire Council
Decision Date:	17 February 2020
Exemptions considered:	Sections 33(1), 34(1)(a), 34(1)(b)
Citation:	<i>Metricon Homes Pty Ltd and Campaspe Shire Council (Freedom of Information)</i> [2020] VICmr 29 (17 February 2020)

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FREEDOM OF INFORMATION – council documents – building plans and drawings – internal floor plan – external building plans

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 satisfied the internal floor plan is exempt under section 33(1) and there is no obligation to provide a copy of this page with exempt information deleted in accordance with section 25. Accordingly, access is denied in full under section 33(1).

I am not satisfied the elevation plan, site plan and pegout plan are exempt under sections 33(1), 34(1)(a) or 34(1)(b). Accordingly, access to these pages is granted in full, except for the names of third parties which the Applicant excluded from the scope of the review. I am satisfied it is practical to delete this irrelevant information in accordance with section 25.

My reasons for decision follow.

**Joanne Kummrow**  
Public Access Deputy Commissioner

17 February 2020

## Reasons for Decision

### Background to review

1. The Applicant, through its legal representative, made a request to the Agency for access to the following documents:

Working drawings approved for the construction for [specified lot and address in Victoria], with any information relating to the personal affairs of any person, such as the names of any individuals, redacted.
2. By way of background only, the Applicant made a previous similar FOI request to the Agency for the same documents. The Agency appears to have refused access under sections 33(1) and 34(1)(b).
3. In its decision, the Agency identified a four page document falling within the terms of the Applicant's request and refused access to the document in full under sections 33(1) and 34(1)(a) and 34(1)(b). The Agency's decision letter sets out the reasons for its decision.

### Review

4. The Applicant, through its legal representative, sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
5. I have examined a copy of the document subject to review.
6. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
7. I have considered all communications and submissions received from the parties, including:
  - (a) the Agency's decision on the FOI request;
  - (b) information provided with the Applicant's review application and subsequent correspondence with OVIC; and
  - (c) the Agency's submission dated 6 December 2019.
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.

### Review of exemptions

9. The four page document subject to review comprises one page for each of the following building plans:
  - (a) elevation plan;
  - (b) site plan;
  - (c) internal floor plan; and
  - (d) pegout plan.

10. In seeking review, the Applicant confirmed it does not seek the personal affairs information of any individuals named in the document. I have disregarded this information for the purposes of my review.
11. However, as discussed below, while the Applicant may not seek access to names and contact details of persons named in the document, I am satisfied the detailed internal floor plan nonetheless contains the personal affairs information of the property owners.
12. Accordingly, my review of the four pages considers the exemptions under sections 33(1), 34(1)(a) and 34(1)(b).

### **Section 33(1)**

13. A document is exempt under section 33(1) if two conditions are satisfied:
  - (a) disclosure of the document under the FOI Act would 'involve' the disclosure of information relating to the 'personal affairs' of a person other than the Applicant;<sup>1</sup> and
  - (b) such disclosure would be 'unreasonable'.
14. Information relating to a person's 'personal affairs' includes, but is not limited to, information that identifies any person, or discloses their address or location. It also includes any information from which this may be reasonably determined.<sup>2</sup>
15. Determining whether disclosure would be unreasonable involves balancing the public interest in the disclosure of official information with the need to protect an individual's personal privacy in the particular circumstances of a matter.
16. Section 33(2A) requires that, in deciding whether disclosure of personal affairs information would be unreasonable, I must take into account whether disclosure would, or would be reasonably likely to, endanger the life or physical safety of any person. However, I do not consider this to be a relevant factor in this matter.
17. In deciding whether disclosure of a document would involve the unreasonable disclosure of a third party's personal affairs information, an agency must notify the person an FOI request has been received and seek their view on disclosure of their personal information in the document.<sup>3</sup> However, in this case, the Agency did not consult with the relevant third party – the property owner.
18. In respect to the internal floor plan, I am satisfied this detailed internal building plan for a private residential property constitutes the personal affairs information of the property owner and it would be unreasonable to disclose this information to the Applicant.
19. However, I am not satisfied the other three plans, which disclose external elevations, the site plan and pegout plan, are exempt under section 33(1) on grounds disclosure of these pages represent the outside and publicly visible part of a residential property. As such, I am not satisfied their disclosure is unreasonable.

### **Section 34(1)(a)**

20. In light on my decision in relation to the internal floor plan, it is not necessary for me to consider the application of section 34(1)(a) and 34(1)(b) to this page.

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<sup>1</sup> Sections 33(1) and (2).

<sup>2</sup> Section 33(9).

<sup>3</sup> Section 33(2B).

21. Section 34(1)(a) provides a document is an exempt document if its disclosure under the FOI Act:
  - (a) would disclose information acquired by an agency (or a Minister) from a business, commercial or financial undertaking; and
  - (b) the information relates to trade secrets.
22. 'Undertaking' means a private or commercial business entity with which an agency has had financial, commercial or business dealings or from which the agency has acquired or received documents.<sup>4</sup>
23. What constitutes a 'trade secret' is primarily a question of fact. The Full Federal Court of Australia has held 'trade secret' does not have a technical legal meaning and the term should be given its ordinary meaning.<sup>5</sup>
24. The information must comprise commercial or business secrets used, or useable, in trade and commerce. However, a trade secret does not need to be technical or confidential information. Further, term 'trade secret' does not include every piece of commercially sensitive information.<sup>6</sup>

*Would the document disclose information acquired the agency from a business, commercial or financial undertaking?*

25. The document comprises building plans prepared by a private building company.
26. From my review of the document, I am satisfied:
  - (a) the company is a business or commercial undertaking for the purposes of section 34(1) (the **undertaking**);
  - (b) the document was acquired by the Agency from the undertaking as part of an Agency statutory approval process for the proposed construction of a residential building; and
27. The Agency advised it consulted with the undertaking as to its views on disclosure of the document, in accordance with the requirement in section 34(3).
28. The undertaking objected to disclosure of the document to the Applicant, referencing its objection to the previous access request made by the Applicant in [year] in relation to which the undertaking made an offer for the Applicant to make an appointment to view the document at the undertaking's offices.
29. From my review of the document, I am satisfied certain information in the document is of a technical nature and may be considered commercially sensitive by the undertaking. However, I do not consider it amounts to a 'trade secret' as required by section 34(1)(a).
30. I consider information, that constitutes a trade secret, is in the nature of an undertaking's intellectual property and which is not widely known and its disclosure would enable a competitor to gain an unfair competitive advantage. In this matter, the relevant pages of the document constitute high level building plans. I do not consider the document contains technical or other specialised knowledge that constitutes a 'trade secret'.
31. Accordingly, I am not satisfied the document is exempt under section 34(1)(a).

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<sup>4</sup> *Thwaites v DHS* [1999] VCAT 11; *Re Marples and Department of Agriculture* (1995) 9 VAR 29 at [56].

<sup>5</sup> *Searle Australia Pty Ltd v Public Interest Advocacy Centre and Another* (1992) 108 ALR 163.

<sup>6</sup> *Byrne v Swan Hill Rural City Council* (2000) 16 VAR 366; [2000] VCAT 666 at [37]; *Stewart v Department of Tourism, Sport and the Commonwealth Games* (2003) 19 VAR 363; [2003] VCAT 45 at [26].

### **Section 34(1)(b)**

32. Section 34(1)(b) provides a document is an exempt document if:

- (a) its disclosure under the FOI Act would disclose information acquired by an agency from a business, commercial or financial undertaking;
- (b) the information relates to other matters of a business, commercial or financial nature; and
- (c) the disclosure of the information would be likely to expose the undertaking unreasonably to disadvantage.

33. In *Thwaites v Department of Human Services*,<sup>7</sup> the Victorian Civil and Administrative Tribunal (VCAT) observed the phrase 'information acquired' signifies the need for some positive handing over of information in some precise form.

34. VCAT has also recognised the words 'business, commercial or financial nature' have their ordinary meaning.<sup>8</sup>

35. The phrase 'expose the undertaking unreasonably to disadvantage' in section 34(1)(b) contemplates disclosure of a document may involve a measure of disadvantage for an undertaking. The issue for is whether an undertaking will be exposed unreasonably to disadvantage.

36. Section 34(2) provides:

In deciding whether disclosure of information would expose an undertaking unreasonably to disadvantage, for the purposes of paragraph (b) of subsection (1), an agency or Minister may take account of any of the following considerations—

- (a) whether the information is generally available to competitors of the undertaking;
- (b) whether the information would be exempt matter if it were generated by an agency or a Minister;
- (c) whether the information could be disclosed without causing substantial harm to the competitive position of the undertaking; and
- (d) whether there are any considerations in the public interest in favour of disclosure which outweigh considerations of competitive disadvantage to the undertaking, for instance, the public interest in evaluating aspects of government regulation of corporate practices or environmental controls—

and of any other consideration or considerations which in the opinion of the agency or Minister is or are relevant.

37. I have also had regard to *Dalla-Riva v Department of Treasury and Finance*,<sup>9</sup> in which VCAT held documents are exempt under section 34(1)(b) if disclosure would:

- (a) give the undertaking's competitors a financial disadvantage;
- (b) enable competitors to engage in destructive competition with the undertaking; and

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<sup>7</sup> (1999) 15 VAR 1.

<sup>8</sup> *Gibson v Latrobe CC* [2008] VCAT 1340 at [25].

<sup>9</sup> [2007] VCAT 1301 at [33].

- (c) would lead to the drawing of unwarranted conclusions as to the undertaking's financial affairs and position with commercial and market consequences.

*Does the document contain information related to matters of a business, commercial or financial nature and acquired by the Agency from a business undertaking?*

- 38. I am satisfied the document contains building plans for a private residential property which were acquired from the undertaking by the Agency in the course of its planning functions.
- 39. Further, I am satisfied the information in the documents relates to matters of a business and commercial nature.

*Would disclosure of the information likely expose the undertaking unreasonably to disadvantage?*

- 40. I am not satisfied disclosure of the document would be reasonably likely to expose the undertaking unreasonably to disadvantage, for the following reasons:
  - (a) While the information in the document may or may not be known to competitors of the business undertaking, I consider it is unlikely the non-detailed information in the three pages of documents would give a competitor a financial advantage or allow a competitor to engage in destructive competition with the undertaking if released.
  - (b) In this case, I note the Applicant is a large volume builder. Its legal representative advised the purpose for seeking access to the documents concerns establishing whether the undertaking's copyright has been infringed. As such, in the circumstances of this matter, I do not consider disclosure of the three non-detailed plans would expose the undertaking unreasonably to commercial disadvantage as contemplated under section 34(1)(b).
  - (c) The Agency sought the views of the business undertaking in accordance with section 34(3). Although the business undertaking objected to disclosure of the document, its response was general in nature and did not provide any detailed information about how disclosure of the documents would cause it unreasonable disadvantage. I also note, during consultation undertaken with the undertaking as part of the Applicant's previous FOI request for the same document, the undertaking offered for the Applicant to meet at its offices and to view the document.
  - (d) I have had regard to the object of the FOI Act in section 3(1), which is to create a general right of access to information in the possession of government or other public bodies, limited only by exceptions and exemptions necessary to protect 'essential' public interests, privacy and business affairs. This broad right provides any person may request access to any document held by an agency without cause or connection to a document or its subject matter. Further, section 3(2) of the FOI Act provides it is Parliament's intention the provisions of the FOI Act must be interpreted to further the object of the Act.
- 41. In light of the above factors, I am not satisfied disclosure of the document would expose the undertaking unreasonably to disadvantage and, therefore, the document is not exempt under section 34(1)(b).

***Deletion of exempt or irrelevant information***

- 42. Section 25 requires an agency to grant access to an edited copy of a document when it is practicable for the agency to delete exempt or irrelevant information from the document and the applicant agrees to receiving such a copy.

43. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'<sup>10</sup> and the effectiveness of the deletions. Where deletions would render a document meaningless, they are not 'practicable', and release of the document is not required under section 25.<sup>11</sup>
44. I have considered the effect of deleting information exempt under section 33(1) from the floor plan, in accordance with section 25. I am satisfied it is not practicable to do so, as the edited document would not retain meaning.
45. I have also considered the effect of deleting irrelevant personal affairs information from the elevation plan, site plan and pegout plan, in accordance with section 25. I am satisfied it is practicable to do so, as the work involved is not substantial and the edited document would retain meaning.

### **Conclusion**

46. On the information before me:
  - (a) I am satisfied the internal floor plan is exempt under section 33(1) and there is no obligation to provide a copy of this page with exempt information deleted in accordance with section 25. Accordingly, access is denied in full under section 33(1).
  - (b) I am not satisfied the elevation plan, site plan and pegout plan are exempt under sections 33(1), 34(1)(a) or 34(1)(b). Accordingly, access to these pages is granted in full, except for the names of third parties which the Applicant excluded from the scope of the review. I am satisfied it is practical to delete this irrelevant information in accordance with section 25.

### **Review rights**

47. 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>12</sup>
48. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.<sup>13</sup>
49. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.<sup>14</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 either party applies to VCAT for a review of my decision.<sup>15</sup>

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

52. I have decided to release documents that contain matters of a commercial nature relating to third party business undertaking.

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<sup>10</sup> *Mickelborough v Victoria Police (General)* [2009] VCAT 2786 at [31]; *The Herald and Weekly Times Pty Limited v The Office of the Premier (General)* [2012] VCAT 967 at [82].

<sup>11</sup> *Honeywood v Department of Human Services* [2006] VCAT 2048 at [26]; *RFJ v Victoria Police FOI Division (Review and Regulation)* [2013] VCAT 1267 at [140] and [155].

<sup>12</sup> The Applicant in section 50(1)(b) and the Agency in section 50(3D).

<sup>13</sup> Section 52(5).

<sup>14</sup> Section 52(9).

<sup>15</sup> Sections 50(3F) and (3FA).

53. The relevant third party will be notified of my decision and is entitled to apply to VCAT for a review within 60 days from the date they are given notice.
54. My decision does not take effect until the relevant review period (stated above) expires. If a review application is made to VCAT, my decision will be subject to any VCAT determination.