

## Notice of Decision and Reasons for Decision

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| Applicant:            | 'BE9'  |
| Agency:               | Banyule City Council   |
| Decision Date:        | 10 March 2020  |
| Exemption considered: | Sections 38A(1)(a), 38A(1)(d)  |
| Citation:             | 'BE9' and Banyule City Council ( <i>Freedom of Information</i> ) [2020] VICmr 51 (10 March 2020) |

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FREEDOM OF INFORMATION – council documents – subdivision of land – sale of land – contractual matters – closed council meeting

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.

I am satisfied Documents 1 and 2 are exempt under section 38A(1)(a); and pages 1 and 2 of Document 3 are exempt under section 38A(1)(d).

As I am satisfied it is not practicable to delete exempt information from the documents in accordance with section 25, the documents are exempt in full.

The Schedule of Documents in **Annexure 1** sets out my decision in relation to each document.

My reasons for decision follow.

**Joanne Kummrow**  
Public Access Deputy Commissioner  
10 March 2020

## Reasons for Decision

### Background to review

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

All documents relating to the decision making process regarding the subdivision (discontinuance) of [address] by Council from [date range] including briefings, memoranda, text messages, file notes, handwritten notes and voice recording or records of conversations. Including Councillor correspondence.

Correspondence between Council staff (including Councillors) and the purchaser or representatives of the purchaser in relation to the [date] sale of [address]. Including briefings, memoranda, text messages, file notes, handwritten notes and voice recordings or records of conversations.

Internal staff correspondence (including Councillors) in relation to the [date] sale of [address]. Including briefings, memoranda, text messages, file notes, handwritten notes and voice recordings or records of conversations.

\*For the avoidance of doubt, the parcel of land I am referring to was approximately [specified size]m<sup>2</sup> and was sold by Council for [specified dollar amount] (Council's reference [number]), and settlement took place on [date]. The transferee of the land was [proprietary company].

2. In its decision, the Agency identified certain documents falling within the terms of the Applicant's request and granted access to certain documents in part and refused access to other documents in full.

### Review

3. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
4. The Applicant advised they do not seek review of information the Agency exempted under sections 33(1) or 34(1)(b). Accordingly, this review relates to three documents to which the Agency refused access in full under section 38A(1)(a).
5. I note the Agency's decision letter refers to three documents comprising 21 pages being exempt in full under section 38A(1)(a). During the review, the Agency advised the last three pages of Document 3 were duplicated in another part of the request and those documents were released to the Applicant. As such, these released pages are not subject to my review.
6. I have examined copies of the documents subject to review.
7. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
8. 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
  - (c) information provided by the Agency in relation to the review on 10 and 25 February 2020.
9. 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

10. The Agency relied on the exemption under section 38A(1)(a) to refuse access to the documents. The Agency's decision letter sets out the reasons for its decision.

### Section 38A(1)(a)

11. A document is exempt under section 38A(1)(a) if it is:

the official record of any deliberation or decision of a closed meeting or part of a closed meeting (other than the official record under section 89(3) of the Local Government Act 1989 in the minutes of a meeting of the reason for closing a meeting to the public);

12. Section 89 of the *Local Government Act 1989* (Vic) (**LG Act**) states:

(1) Unless subsection (2) applies, any meeting of a Council or a special committee must be open to members of the public.

(2) A council or a special committee may resolve that the meeting be closed to members of the public if the meeting is discussing any of the following –

...

(d) contractual matters;

...

(3) If a Council or special committee resolves to close a meeting to members of the public the reason must be recorded in the minutes of the meeting.

...

13. I am satisfied Documents 1 and 2 form the official record of deliberations or decisions of a closed council meeting held by the Agency for the following reasons:

(a) Documents 1 and 2 state the matters subject of the minutes were discussed during a closed council meeting, in accordance with section 89(2) of the LG Act.

(b) The Victorian Civil and Administrative Tribunal (**VCAT**) has held Council minutes form the official record of a decision that was made during a closed Council meeting and, therefore, are exempt under section 38A(1)(a).<sup>1</sup>

(c) I am satisfied the documents do not fall into the exception in section 89(3), being the reasoning recorded for closure of the council meeting in the meeting minutes.

(d) Accordingly, as I am satisfied the relevant council meeting was closed, the minutes and attachments relating to that part of the meeting are exempt under section 38A(1)(a).

14. The Schedule of Documents in **Annexure 1** contains a summary of my decision with respect to section 38A(1)(a).

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<sup>1</sup> *Russell v Yarra Ranges SC (Review and Regulation)* [2014] VCAT 93 at [28].

### **Section 38A(1)(d)**

15. A document is exempt under section 38A(1)(d) if it is:
  - a document the disclosure of which would involve the disclosure of any deliberation or decision of a closed meeting (other than the official record under section 89(3) of the Local Government Act 1989 in the minutes of a meeting of the reason for closing a meeting to the public) or of a meeting that is likely to be a closed meeting;
16. Document 3 is an administrative document, containing directions to administrative staff for action as a result of deliberations and decisions made at a closed council meeting.
17. As stated above, subsequent to its decision, the Agency advised it had released the last three pages of this document to the Applicant as part of other released documents. As such, these released pages are not subject to my review.
18. I note Document 3 does not appear to be an official record of deliberations or a decision, as it is unsigned and administrative in nature. However, the document contains information copied from Documents 1 and 2.
19. I accept the Agency's submission disclosure of information on pages 1 and 2 would disclose information discussed at a closed council meeting, and contain extracts from the official record in Document 2.
20. Therefore, I am satisfied pages 1 and 2 of the document, if released, would disclose the Council's decision and/or deliberations at a closed meeting and are exempt under section 38A(1)(d).
21. The Schedule of Documents in **Annexure 1** sets out my decision with respect to section 38A(1)(d).

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

22. 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 and the applicant agrees to receiving such a copy.
23. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'<sup>2</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>3</sup>
24. I have considered the information the Agency deleted from the documents as irrelevant. I agree it falls outside the scope of the Applicant's request as it consists of matters discussed by the council other than those specified in the Applicant's request.
25. I have considered the effect of deleting exempt information from the documents in accordance with section 25. I am satisfied it is practicable to delete the exempt information as to do so would not involve substantial effort or render the documents meaningless.

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<sup>2</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>3</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].

### **Conclusion**

26. On the information before me, I am satisfied Documents 1 and 2 are exempt under section 38A(1)(a); and pages 1 and 2 of Document 3 are exempt under section 38A(1)(d).
27. I have considered the effect of deleting exempt information from the documents in accordance with section 25. I am satisfied it is not practicable to do so as the nature of the exemption means these documents are exempt in full.

### **Review rights**

28. If either party to this review is not satisfied with my decision, they are entitled to apply to the VCAT for it to be reviewed.<sup>4</sup>
29. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.<sup>5</sup>
30. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.<sup>6</sup>
31. 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.
32. 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>7</sup>

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

33. 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.

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<sup>4</sup> The Applicant in section 50(1)(b) and the Agency in section 50(3D).

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

<sup>6</sup> Section 52(9).

<sup>7</sup> Sections 50(3F) and (3FA).

Annexure 1 – Schedule of Documents

| Document No. | Date of Document | Document Description                        | Number of Pages | Agency's Decision                         | OVIC Decision                            | OVIC Comments  |
|--------------|------------------|---|-----------------|---|--|--|
| 1.           | [date]           | Proposed Road Discontinuance                | 11              | Refused in full<br>Section 38A(1)(a)      | Refuse in full<br>Section 38A(1)(a)      | <p><b>Section 38A(1)(a):</b> I am satisfied Document 1 forms the official record of deliberations or decisions of a closed council meeting held by the Agency and is exempt under section 38A(1)(a).</p> <p><b>Section 25:</b> I am satisfied it is not practicable to delete exempt information from the document as the nature of the exemption and the information in this document means it is exempt in full.</p> |
| 2.           | [date]           | Proposed sale of adjacent discontinued road | 5               | Refused in full<br>Sections 38A(1)(a), 25 | Refuse in full<br>Sections 38A(1)(a), 25 | <p><b>Sections 38A(1)(a):</b> See comments for Document 1 above.</p> <p><b>Section 25:</b> See comments for Document 1 above. In addition, I am satisfied the document contains information irrelevant to the Applicant's request and it is practicable to delete exempted information in accordance with section 25.</p>  |
| 3.           | [date]           | Draft Confidential Council Meeting Report   | 5               | Released in part<br>Section 38A(1)(a)     | Refuse in full<br>Sections 38A(1)(d), 25 | <p>Subsequent to its decision, the Agency advised it had released the last three pages of this document to the Applicant. As such, these released pages are not subject to my review.</p> <p><b>Section 38A(1)(d):</b> I am satisfied pages 1 and 2 of this document, if released, would</p>   |

**Annexure 1 – Schedule of Documents**

| Document No. | Date of Document | Document Description | Number of Pages | Agency's Decision | OVIC Decision | OVIC Comments  |
|--------------|------------------|----------------------|-----------------|-------------------|---------------|--|
|              |                  |                      |                 |                   |               | <p>disclose the Council's decision and/or deliberations at a closed meeting and are exempt under section 38A(1)(d).</p> <p><b>Section 25:</b> See comments for Document 1 above.</p> |