

Notice of Decision and Reasons for Decision

Applicant:	'AZ3'
Agency:	Bayside City Council
Decision date:	30 December 2019
Exemption considered:	Section 34(1)(b) 'AZ3' and Bayside City Council (<i>Freedom of Information</i>) [2019] VICmr
Citation:	229 (30 December 2019)

FREEDOM OF INFORMATION – council documents – development plans – prepared by an architect – communication between agency and business undertaking – disputed approval of plans for apartments

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 the documents are exempt under section 34(1)(b). As it is practicable to delete irrelevant information from the documents, I have decided to grant access to the documents in part in accordance with section 25.

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
30 December 2019

Reasons for Decision

Background to review

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

All correspondence (electronic and paper), limited to the Planning Department and their file, in regard to the Planning Permit reference number [number] for the land comprising [street address], [street address], and [street address], [in suburb], passing between Bayside City Council and any other person, public corporation, Victorian Government Department or corporate entity, including but not limited to:

- [third party]
- [third party]
- [Victorian Government agency]
- [Victorian Government agency]
- [Victorian Government agency]

2. In its decision, the Agency identified 86 documents falling within the terms of the Applicant's request and granted access to the documents in part.

Review

3. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
4. In their request, the Applicant advised they do not seek personal affairs information of third parties. Therefore, this information is irrelevant to my review.
5. In their review request, the Applicant advised they seek access to the documents to understand changes made to the relevant planning permit. The Applicant submits release of the documents is in the public interest as they relate to the use of land owned by the State Government and disclosure would demonstrate whether the Agency is complying with applicable laws.
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 received from the parties, including:
 - (a) the Agency's decision on the FOI request;
 - (b) the Applicant's review application;
 - (c) all subsequent communications with the Applicant and the Agency.
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 relies on section 30(1) and 34(1)(b) to refuse access to parts of the documents. The Agency's decision letter sets out the reasons for its decision. The Agency no longer relies on section 30(1).

Section 34(1)(b)

11. Section 34(1)(b) provides a document is an exempt document if its disclosure under the FOI Act would disclose information acquired by an agency (or a Minister) from a business, commercial or financial undertaking and:
- (a) the information relates to other matters of a business, commercial or financial nature; and
 - (b) the disclosure of the information would be likely to expose the undertaking unreasonably to disadvantage.
12. In *Thwaites v Department of Human Services*, the Victorian Civil and Administrative Tribunal (**VCAT**) observed the phrase 'information acquired' in section 34(1) signifies the need for some positive handing over of information in some precise form.
13. The words 'business, commercial or financial nature' are to be given their ordinary meaning.¹
14. 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.

15. I consider the reference in section 34(1)(b) to 'expose the undertaking unreasonably to disadvantage' contemplates that disclosure of documents may involve a measure of disadvantage for an undertaking. Parliament determined, by the introduction in 1993 of the word 'unreasonably' that the exemption contemplates a certain level of disadvantage. The issue is whether an undertaking will be exposed unreasonably to disadvantage.
16. In relation to the application of section 34(1)(b), the Agency submitted:

The disclosure of the information would disclose certain commercial methodologies and internal processes undertaken by that organisation.

¹ [*Gibson v Latrobe CC* [2008] VCAT 1340 at [25]]

The information contained in the documents is currently not in the public domain, and the organisation is engaged in a commercial development including ultimately display and sale of elements of that development. The firm has in place a planned release and sales strategy which could be jeopardized were certain details of the development to be released now.

The information is not generally available or known to competitors and is seen as highly sensitive by the contractor. In addition, some of the information was supplied early in the development and some of that data has changed over time. Confusion may therefore flow were it to be released to [the applicant].

Disclosure of the contents of such documents could be misleading as it does not (without something more) necessarily disclose the whole of the reasons for a particular action or the cause, flowing from particular issues.

The information was supplied in confidence. It is felt these submissions and exchanges should therefore remain confidential.

The competitive advantage of the contractor would be diminished were such information to be released to [the applicant] as then the Council and the firm loses the ability to control such information. As such, any release would be contrary to the public interest.

17. The Agency consulted with three business undertakings which provided information to the Agency which is subject to this review:
 - (a) Business undertaking 1 objected to the disclosure of their documents on the basis that the documents are not in their final form, and that business undertaking two is yet to launch its marketing campaign. The undertaking advised it has been careful to ensure the information is not public until the appropriate time.
 - (b) Business undertaking 2 asked that certain information not be disclosed on the basis that it is yet to launch its marketing campaign and the designs are not in their final form.
 - (c) Business undertaking 3 objected to the release of its documents as they are not the final plans and that Business undertaking two had not yet launched its marketing campaign. It stated it is concerned disclosure of the documents would 'negatively impact the forthcoming project launch'.
18. My decision in relation to section 34(1)(b) and each of the documents is set out in **Annexure 1**.

Deletion of exempt or irrelevant information

19. Section 25 requires an agency to grant access to an edited copy of a document when it is practicable for the agency or Minister to delete exempt or irrelevant information and the applicant agrees to receiving such a copy.
20. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'² and the effectiveness of the deletions. Where deletions would render the document meaningless they are not 'practicable' and release of the document is not required under section 25.³
21. I have considered information the Agency deleted from the documents as irrelevant. I agree it falls outside the scope of the Applicant's request as it relates to matters or people other than those specified in the Applicant's request.

² *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].

³ *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].

22. I have considered the effect of deleting irrelevant and exempt information from the documents. In my view, it is practicable to delete such information as to do so would not require substantial time and effort, and the edited documents would retain meaning.

Conclusion

23. On the information before me, I am not satisfied the documents are exempt under section 34(1)(b).
24. As it is practicable to delete irrelevant information from the documents, I have decided to grant access to the documents in part in accordance with section 25.

Review rights

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

When this decision takes effect

30. I have decided to release documents that contain information relating to matters of a commercial nature relating to third party businesses.
31. The relevant third parties will be notified of my decision and are entitled to apply to VCAT for a review within 60 days from the date they are given notice.
32. 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.

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

⁵ Section 52(5).

⁶ Section 52(9).

⁷ Sections 50(3F) and (3FA).

Annexure 1 – Schedule of Documents

Doc. No.	Document Date	Title	No. of Pages	Agency's Decision	OVIC Decision	OVIC Comments
<p><i>Note: The Applicant sought review of specific documents set out in the schedule attached to the Agency's decision letter only. During the review, the Applicant agreed to narrow the scope of the review further as set out below.</i></p>						
27	[date]	Plans	26	Refused in full Section 34(1)(b)	Release in full	<p>Section 34(1)(b): The document comprises plans of a building and a table setting out apartment sizes and parking permits. It was prepared by a business undertaking.</p> <p>I agree the information was acquired by the Agency and relates to matters of a business or commercial nature.</p> <p>However, I do not consider the business undertaking has demonstrated disclosure of the document would be likely to expose it unreasonably to disadvantage, for the following reasons:</p> <ul style="list-style-type: none"> • I note the advice the plans are not in their final form. However, I am not persuaded that disclosure of draft plans would expose the undertaking to a competitive disadvantage, where the plans relate to a specific site and a specific planning permit. • The business undertaking has not provided sufficient information for me to be satisfied disclosure would cause it substantial harm. • There is a substantial public interest in disclosure of Council documents where they relate to planning decisions that affect local residents and where such disclosure can provide for greater transparency in the planning and development process.

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						Therefore, I am not satisfied this document is exempt under section 34(1)(b).
28	[date]	Email	1	Released in part Section 34(1)(b)	Not subject to review	The Applicant excluded this document from the scope of the review.
29	[date]	Plans	2	Refused in full Section 34(1)(b)	Release in full	Section 34(1)(b): The document is not exempt for the reasons set out in Document 1.
35	[date]	Letter and plans	7	Released in part Section 34(1)(b)	Release in part Section 25 The document is to be released with the following irrelevant information deleted: <ul style="list-style-type: none"> the names, position titles and contact details on page 1; the signature, name and position title on page 2. 	Section 34(1)(b): The document is not exempt for the reasons set out in Document 1. Section 25: The Applicant agreed to exclude information relating to personal affairs information. Accordingly, I consider the names, position titles and contact details in the document to be irrelevant and it is practicable to remove such information from the document.
36	[date]	Email	3	Released in part	Not subject to	This document is part of a chain email. On [date], the Applicant agreed for this review to be for the final email

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Doc. No.	Document Date	Title	No. of Pages	Agency's Decision	OVIC Decision	OVIC Comments
				Section 34(1)(b)	review	chain that includes all preceding emails.
37	[date]	Email	6	Released in part Section 34(1)(b)	<p>Release in part</p> <p>Section 25</p> <p>The document is to be released with the following irrelevant information deleted:</p> <ul style="list-style-type: none"> the names, position titles, contact details, email addresses on pages 1 to 6. 	<p>Section 34(1)(b): The document is not exempt for the reasons set out in Document 1.</p> <p>Section 25: See comments for Document 35.</p>
38	[date]	Email	3	Released in part Section 34(1)(b)	<p>Release in part</p> <p>Section 25</p> <p>The document is to be released with the following irrelevant information deleted:</p> <ul style="list-style-type: none"> the names, position titles, contact details, email addresses on pages 1 and 2. 	<p>Section 34(1)(b): The Agency exempted parts of page 2. I note this information is the same as in Document 48 and the Agency no longer considers this information exempt.</p> <p>Section 25: See comments for Document 35.</p>

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Doc. No.	Document Date	Title	No. of Pages	Agency's Decision	OVIC Decision	OVIC Comments
44	[date]	Email	2	Released in part Sections 30(1), 34(1)(b)	Not subject to review	Chain emails: See comments for Document 36.
45	[date]	Schedule	12	Released in part Section 34(1)(b)	[Release in part] [Section 25] [The document is to be released with the following irrelevant information deleted: • the telephone numbers and email addresses.]	Section 34(1)(b): The document is not exempt for the reasons set out in Document 1. Section 25: See comments for Document 35.
46	[date]	Email	2	Released in part Sections 30(1), 34(1)(b)	Not subject to review	Chain emails: See comments for Document 36.
47	[date]	Email	3	Released in part Sections 30(1), 34(1)(b)	Release in part Section 25 The document is to be released with the following irrelevant information deleted: • the names, position titles,	Section 34(1)(b): See comments for Document 38. Section 25: See comments for Document 35.

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Doc. No.	Document Date	Title	No. of Pages	Agency's Decision	OVIC Decision	OVIC Comments
					contact details and email addresses on pages 1 and 2.	
48	[date]	Email	2	Released in part Sections 30(1), 34(1)(b)	Not subject to review	Chain emails: See comments for Document 36.
49	[date]	Schedule	10	Released in part Section 34(1)(b)	Release in full	Section 34(1)(b): The document is not exempt from release for the reasons set out in Document 1.
50	[date]	Email	4	Released in part Sections 30(1), 34(1)(b)	Not subject to review	Chain emails: See comments for Document 36.
51	[date]	Email	4	Released in part Sections 30(1), 34(1)(b)	Not subject to review	Chain emails: See comments for Document 36.
52	[date]	Email	5	Released in part Sections 30(1), 34(1)(b)	Not subject to review	Chain emails: See comments for Document 36.
53	[date]	Plans	30	Refused in full Section 34(1)(b)	Release in full	Section 34(1)(b): The document is not exempt for the reasons set out in Document 1.
54	[date]	Email	3	Released in part Sections 30(1), 34(1)(b)	Not subject to review	Chain emails: See comments for Document 36.
55	[date]	Plans	33	Refused in full Section 34(1)(b)	Release in full	Section 34(1)(b): The document is not exempt for the reasons set out in Document 1.

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Doc. No.	Document Date	Title	No. of Pages	Agency's Decision	OVIC Decision	OVIC Comments
55a	[date]	Email	4	Released in part Sections 30(1), 34(1)(b)	Not subject to review	Chain emails: See comments for Document 36.
56	[date]	Email	4	Released in part Sections 30(1), 34(1)(b)	Not subject to review	Chain emails: See comments for Document 36.
57	[date]	Letter	2	Released in part Section 34(1)(b)	Not subject to review	The Applicant excluded this document from the scope of the review.
58	[date]	Email	4	Released in part Sections 30(1), 34(1)(b)	Not subject to review	Chain emails: See comments for Document 36.
59	[date]	Email	4	Released in part Sections 30(1), 34(1)(b)	Not subject to review	Chain emails: See comments for Document 36.
60	[date]	VCAT Decision	67	Excluded Section 14(1)(a)	Not subject to review	The Applicant excluded this document from the scope of the review.
61	[date]	Email	5	Released in part Sections 30(1), 34(1)(b)	Not subject to review	Chain emails: See comments for Document 36.
62	[date]	Email	5	Released in part Sections 30(1), 34(1)(b)	Release in part Section 25 The document is to be released with the following irrelevant information deleted:	Sections 30(1), 34(1)(b): See comments for Document 38. Section 25: See comments for Document 35.

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					<ul style="list-style-type: none"> the names, position titles, contact details, email addresses on pages 1 to 4. 	
63	[date]	Memorandum	6	Released in part Section 34(1)(b)	<p>Release in part Section 25</p> <p>The document is to be released with the following irrelevant information deleted:</p> <ul style="list-style-type: none"> the name on page 1. 	<p>Section 34(1)(b): The document is not exempt for the reasons set out in Document 1.</p> <p>Section 25: See comments for Document 35.</p>
64	[date]	Memorandum	6	Released in part Section 34(1)(b)	<p>Release in part Section 25</p> <p>The document is to be released with the following irrelevant information deleted:</p> <ul style="list-style-type: none"> the name on page 1. 	<p>Section 34(1)(b): The document is not exempt for the reasons set out in Document 1.</p> <p>Section 25: See comments for Document 35.</p>
65	[date]	Memorandum	10	Released in part	Release in part	Section 34(1)(b): The document is not exempt for the

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Doc. No.	Document Date	Title	No. of Pages	Agency's Decision	OVIC Decision	OVIC Comments
				Section 34(1)(b)	<p>Section 25</p> <p>The document is to be released with the following irrelevant information deleted:</p> <ul style="list-style-type: none"> the name on page 1. 	<p>reasons set out in Document 1.</p> <p>Section 25: See comments for Document 35.</p>
67	[date]	Memorandum	10	Released in part Section 34(1)(b)	<p>Release in part</p> <p>Section 25</p> <p>The document is to be released with the following irrelevant information deleted:</p> <ul style="list-style-type: none"> the name on page 1. 	<p>Section 34(1)(b): The document is not exempt for the reasons set out in Document 1.</p> <p>Section 25: See comments for Document 35.</p>
68	[date]	Email	2	Released in part Sections 30(1), 34(1)(b)	<p>Release in part</p> <p>Section 25</p> <p>The document is to be released with the following irrelevant information deleted:</p> <ul style="list-style-type: none"> the names, 	<p>Sections 30(1), 34(1)(b): See comments for Document 38.</p> <p>Section 25: See comments for Document 35.</p>

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					position titles, contact details, email addresses on pages 1 to 2.	
70	[date]	Application	24	Released in part Sections 14(1)(a), 34(1)(b)	Not subject to review	The Applicant excluded this document from the scope of the review.
72	[date]	Application	31	Released in part Sections 14(1)(a), 34(1)(b)	Not subject to review	The Applicant excluded this document from the scope of the review.
75	[date]	Email	3	Released in part Section 34(1)(b)	Not subject to review	Chain emails: See comments for Document 36.
77	[date]	Email	4	Released in part Section 34(1)(b)	Not subject to review	Chain emails: See comments for Document 36.
78	[date]	Email	5	Released in part Section 34(1)(b)	Not subject to review	Chain emails: See comments for Document 36.
79	[date]	Schedule	8	Refused in full Section 34(1)(b)	Release in full	Section 34(1)(b): The document is not exempt for the reasons set out in Document 1.
80	[date]	Email	5	Released in part Section 34(1)(b)	Release in part Section 25 The document is to	Section 34(1)(b): The document is not exempt for the reasons set out in Document 1. Section 25: See comments for Document 35.

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Doc. No.	Document Date	Title	No. of Pages	Agency's Decision	OVIC Decision	OVIC Comments
					<p>be released with the following irrelevant information deleted:</p> <ul style="list-style-type: none"> the names, position titles, contact details and email addresses on pages 1, 2 and 4. 	