

Notice of Decision and Reasons for Decision

Applicant:	'CT7'
Agency:	City of Greater Geelong
Decision date:	15 March 2021
Exemption considered:	Section 34(1)(b)
Citation:	'CT7' and <i>City of Greater Geelong (Freedom of Information)</i> [2021] VICmr 71 (15 March 2021)

FREEDOM OF INFORMATION – exterior plans – interior plans – manufacturing facility – unreasonable disadvantage

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 section 34(1)(b) applies to one document in part only. I am not satisfied section 34(1)(b) applies to the remainder of the documents.

As it is practicable to edit the documents to delete irrelevant and exempt information, I have determined to grant access to the documents in part.

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

15 March 2021

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency seeking access to the following documents:
 1. Any documents submitted to Greater Geelong City Council by the permit applicant in respect of Planning Permit Application No. [reference] (including, but not limited to, architectural plans, supporting material and any responses from referral authorities);
 2. Any correspondence (which includes letters, emails and text messages and any attachments therein) between the permit applicant and Greater Geelong City Council, and its employees and Councillors, in respect of Planning Permit Application No. [reference] or Planning Permit No. [reference];
 3. Any correspondence (which includes letters, emails and text messages and any attachments therein) the permit applicant, Greater Geelong City Council, including its employees and Councillors, and any referral authorities for the purpose of section 55 of the *Planning and Environment Act 1987*, in respect of Planning Permit No. [reference] or Planning Permit No. [reference]; and
 4. Any other documents Council has in its possession in relation to any assessment, analysis or advice it has received or given in relation to Planning Permit Application No. [reference] or Planning Permit No. [reference].
2. The Agency identified documents falling within the terms of the Applicant's request and refused access to certain documents in full and in part under section 34(1)(b). The Agency's decision letter sets out the reasons for its decision.

Review

3. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
4. During the review, the Applicant advised they seek review of certain documents only, as described in the Schedule of Documents at Annexure 1, and does not seek access to the personal affairs information of third parties.
5. I have examined copies of the documents 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.
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’.¹ 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.

Review of exemptions

Section 38

11. It is open to the Agency, when making a decision under the FOI Act, to consider the application of section 38 in conjunction with section 125 of the *Local Government Act 2020* (Vic). However, the Agency did not do so in this instance.
12. For completeness, having considered the relevant provisions of section 125 I have determined section 38 does not apply to the documents.

Section 34(1)(b)

13. 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.
14. In *Thwaites v Department of Human Services*,² 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.
15. VCAT has also recognised the words ‘business, commercial or financial nature’ have their ordinary meaning.³

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—

¹ *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577 at 591.

² (1999) 15 VAR 1.

³ *Gibson v Latrobe CC* [2008] VCAT 1340 at [25].

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

16. The Agency consulted with relevant business undertakings and I have taken their responses into consideration in my decision.

17. The business undertakings submit:

[the business undertakings'] strongly object to the release of other documents, including plans, on the basis that these contain details which are commercial in confidence and reveal commercial and business aspects of our client's operations. The plans also disclose details of the internal design of the plant not relevant for planning purposes, which may compromise security at the site.

[the business undertaking's] primary business is the manufacture of [description redacted] and other materials used for [description redacted] purposes. The release of the details of the plant has the potential to compromise security arrangements related to contracts for the supply of materials to Government and government agencies.

18. My decision in relation to section 34(1)(b) is set out in the Schedule of Documents in **Annexure 1**.

Section 25 – 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 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'⁴ 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 25.⁵

21. 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 is personal affairs information, which not sought by the Applicant.

22. I have considered the effect of deleting irrelevant or exempt information from the documents in accordance with section 25. I am satisfied it is practicable to delete the irrelevant or exempt 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 satisfied section 34(1)(b) applies to one document in part only. I am not satisfied section 34(1)(b) applies to the remainder of the documents.

24. As it is practicable to provide the Applicant with an edited copy of the documents with irrelevant and exempt information deleted in accordance with section 25, I have granted access to the documents in part.

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

⁴ *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].

⁵ *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].

Review rights

26. If either party to this review is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.⁶
27. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.⁷
28. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.⁸
29. 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.
30. 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.⁹

Third party review rights

31. I have decided to release documents that contain matters of a commercial nature relating to third party business undertakings.
32. The relevant third parties will be notified of my decision and their right to apply to VCAT for a review of my decision within 60 days from the date they are given notice.¹⁰

When this decision takes effect

33. Accordingly, my decision does not take effect until the third parties' 60 day review period expires.
34. If a review application is made to VCAT, my decision will be subject to any VCAT determination.

⁶ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

⁷ Section 52(5).

⁸ Section 52(9).

⁹ Sections 50(3F) and (3FA).

¹⁰ Sections 49P(5), 50(3A) and 52(3).

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	No. of Pages	Agency Decision	OVIC Decision	OVIC Comments
[Year]						
Document 8	[date]	Covering letter for drawings	1	Refused in full Section 34(1)(b)	Release in full	<p>The Agency advised the attachments to this letter form part of [year] Document 6. The Applicant did not seek review of that document.</p> <p>Section 34(1)(b): The document is information acquired by the Agency from a business and constitutes matters of a business or commercial nature.</p> <p>I have determined disclosure would not be likely to expose the undertaking unreasonably to disadvantage for the following reasons:</p> <ul style="list-style-type: none"> the document is more than 20 years old; it contains little substantive information about the business that drew up the plans; and there is no information before me to support disclosure would have any detrimental impact on the business, for example, in business, commercial or financial

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	No. of Pages	Agency Decision	OVIC Decision	OVIC Comments
						<p>terms.</p> <p>Therefore, I am not satisfied the document is exempt under section 34(1)(b).</p>
[Year]						
Document 3	[date]	Plans	3	<p>Refused in full</p> <p>Section 34(1)(b)</p>	Release in full	<p>Section 34(1)(b): The document contains information acquired by the Agency from a business undertaking and constitutes matters of a business or commercial nature.</p> <p>I have determined disclosure of this document would not be likely to expose the undertaking unreasonably to disadvantage for the following reasons:</p> <ul style="list-style-type: none"> the design is for a specific purpose and location. Therefore, I consider it can be released without causing the business that created the designs substantial harm to their competitive position; and I note the business for which the plans were drawn objects to their release. However, given the document does not contain

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	No. of Pages	Agency Decision	OVIC Decision	OVIC Comments
						<p>significant details about the business, the plans refer to external walls (that would be visible to the public) or limited information regarding the interiors of the buildings, I consider it can be disclosed without causing the business undertaking substantial harm to its competitive position.</p> <p>Therefore, I am not satisfied the document is exempt under section 34(1)(b).</p>
[Year]-[reference]						
Document 2	[date]	Plans	1	Refused in full Section 34(1)(b)	Release in full	<p>Section 34(1)(b): The document contains information acquired by the Agency from a business and constitutes matters of a business or commercial nature.</p> <p>I am satisfied its disclosure would not be likely to expose the business undertaking unreasonably to disadvantage for the reasons set out in '[year] Document 3'.</p>
Document 4	[date]	'Environment response' internal	1	Released in part	Release in part	<p>Section 25: The information deleted by the Agency is irrelevant, as the</p>

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	No. of Pages	Agency Decision	OVIC Decision	OVIC Comments
		document		Section 25	Section 25 The document is to be released with irrelevant information deleted in accordance with section 25.	Applicant does not seek access to personal affairs information as part of this review.
Document 9	[date]	Plans	3	Refused in full Section 34(1)(b)	Release in full	Section 34(1)(b): The document contains information acquired by the Agency from a business undertaking constitutes matters of a business or commercial nature. While the plans in this document are more detailed, I have determined their disclosure would not be likely to expose the business undertaking unreasonably to disadvantage for the reasons set out in '[year] Document 3'.
[Year]-[reference]						
Document 7	[date]	[company name] planning application	8	Refused in full Section 34(1)(b)	Release in full	Section 34(1)(b): The document contains information acquired by the Agency from a business undertaking and constitutes matters of a business or commercial nature. I have determined disclosure would not be likely to expose the business

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	No. of Pages	Agency Decision	OVIC Decision	OVIC Comments
						<p>undertaking unreasonably to disadvantage for the following reasons:</p> <ul style="list-style-type: none"> the document contains general information; for example, it does not contain detailed technical information about manufacturing processes at the plant; I note the business undertaking objects to disclosure of the document. However, in my view, given the scant detail about the business in the document, disclosure would not reveal commercial in confidence information of which a competitor of the undertaking could take advantage. Neither does it disclose security arrangements for the business; and I consider the document can be disclosed without causing substantial harm to the competitive position of the business undertaking. <p>Therefore, I am not satisfied the document is exempt under section</p>

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	No. of Pages	Agency Decision	OVIC Decision	OVIC Comments
						34(1)(b).
Document 10	[date]	Plans	3	Refused in full Section 34(1)(b)	Release in full	Section 34(1)(b): See comments for [year] -[reference] Document 9.
[Year]						
Document 10	[date]	Letter from Agency to [company name] Planning regarding planning permit [reference]		Released in part Section 25	Release in part Section 25 The document is to be released with irrelevant information deleted in accordance with section 25.	Section 25: The information deleted by the Agency is irrelevant, as the Applicant does not seek access to personal affairs information as part of this review.
Document 14	[date]	Planning permit assessment report	10	Released in part Sections 34(1)(b), 25	Release in part Section 25 The document is to be released with irrelevant information deleted in accordance with section 25.	Section 34(1)(b): The document contains information acquired by the Agency from a business undertaking and constitutes matters of a business or commercial nature. The information redacted by the Agency is a plan similar to the documents above. I have determined its disclosure would not be likely to expose the undertaking unreasonably to disadvantage for the reasons set out in '[year] Document 3'.

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	No. of Pages	Agency Decision	OVIC Decision	OVIC Comments
						Section 25: The information deleted by the Agency on pages 1 and 10 is irrelevant, as the Applicant does not seek access to personal affairs information as part of this review.
Document 17	[date]	Plans	3	Refused in full Section 34(1)(b)	Release in full	Section 34(1)(b): See comments for [year] -[reference] Document 9.
Document 18	[date]	Plan	1	Refused in full Section 34(1)(b)	Release in full	Section 34(1)(b): See comments for [year] -[reference] Document 9.
[Year]						
Document 2	[date]	Plan	1	Refused in full Section 34(1)(b)	Release in full	Section 34(1)(b): See comments for [year] -[reference] Document 9.
Document 3	[date]	Plans	12	Refused in full Section 34(1)(b)	Release in part Section 34(1)(b), 25 The document is to be released with exempt information deleted in accordance with section 25.	Section 34(1)(b): The document contains information acquired by the Agency from a business undertaking and constitutes matters of a business or commercial nature. Certain plans in this document are more detailed and relate to the interior of the building. They reveal technical details regarding the

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	No. of Pages	Agency Decision	OVIC Decision	OVIC Comments
						<p>manufacturing that takes place at the plant. I have determined their disclosure would reveal sensitive commercial information. As such, I am satisfied disclosure would be likely to expose the business undertaking unreasonably to disadvantage. Accordingly, I am satisfied pages 2, 3, 4, 7, 8 are exempt under section 34(1)(b).</p> <p>I am satisfied the remainder of the plans are not exempt under section 34(1)(b) for the reasons set out in [year] Document 3.</p>
Document 8	[date]	Plans	12	<p>Refused in full</p> <p>Section 34(1)(b)</p>	<p>Release in part</p> <p>Section 34(1)(b), 25</p> <p>The document is to be released with exempt information deleted in accordance with section 25.</p>	<p>This is a duplicate of [year] Document 3.</p> <p>The same decision applies.</p>