

Notice of Decision and Reasons for Decision

Applicant:	Virtue Homes Pty Ltd
Agency:	Latrobe City Council
Decision date:	14 June 2022
Exemptions considered:	Sections 33(1) and 38 in conjunction with section 125(1) of the <i>Local Government Act 2020 (Vic)</i>
Citation:	<i>Virtue Homes Pty Ltd and Latrobe City Council (Freedom of Information)</i> [2022] VICmr 88 (14 June 2022)

FREEDOM OF INFORMATION – council documents – building plans and drawings – internal floor plan – external building plans – personal affairs information – unreasonable to disclose – secrecy provision – *Local Government Act 2020 (Vic)*

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 fresh decision to refuse access to a document requested by the Applicant under the FOI Act.

I am satisfied information on pages 3 and 4 of the document is exempt from release under sections 33(1) and 38 in conjunction with section 125(1) of the *Local Government Act 2020 (Vic)*.

As I am not satisfied it is practicable to provide the Applicant with an edited copy of pages 3 and 4 of the document with irrelevant and exempt information deleted in accordance with section 25, access to these pages is refused in full.

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner

14 June 2022

Reasons for Decision

Background to review

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

Copy of the Building Permit Plans for property: [residential address]
2. Following consultation with the Agency, the Applicant advised they consent to the removal of personal affairs information from the scope of their request.
3. The Agency identified one document totalling 12 pages falling within the terms of the Applicant's request and refused access to the Document in full under sections 34(1)(a) and 34(1)(b). The Agency's decision letter sets out the reasons for its decision.

Review application

4. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
5. Section 49M(1) permits an agency to make a fresh decision on an FOI request during a review.
6. On 11 May 2022, the Agency made a fresh decision within the required 28 days under section 49M(2).
7. The Agency released further information in the document and relied on section 33(1) to refuse access to information in the Document.
8. As the Agency determined to release further information in the document, affected third parties were provided with the right to make an application to the Victorian Civil and Administrative Tribunal (VCAT) for review of the Agency's fresh decision within 60 days of its fresh decision.
9. The Applicant did not agree with the Agency's fresh decision and, as required by section 49MA(2), I proceeded with my review on the basis of the fresh decision.
10. The Applicant seeks review of the information exempted from release under section 33(1) on pages 3 and 4 of the document only (the **Document**).
11. The Applicant reiterated in their response to the fresh decision that they do not seek access to personal affairs information of the owners, draftsman and builders in the Document. For the purposes of this review, it is necessary to consider the scope of personal affairs information broadly as it includes not only the names of third parties, but also other information concerning third parties.
12. I have examined a copy of the Document.
13. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
14. I have considered all communications and submissions received from the parties.
15. 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.

16. 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.

New Local Government Act and its focus on Council integrity

17. On 24 October 2020, the *Local Government Act 2020* (Vic) (**LG Act**) was enacted. The objectives of the LG Act are set out in section 4 and include ensuring, ‘[c]ouncils are constituted as representative bodies that are accountable, transparent, collaborative, efficient and engaged with their communities’.
18. Section 9 of the LG Act sets out overarching governance principles and supporting principles for that Act:
- (1) A Council must in the performance of its role give effect to the overarching governance principles.
 - (2) The following are the overarching governance principles—
 - (a) Council decisions are to be made and actions taken in accordance with the relevant law;
 - (b) priority is to be given to achieving the best outcomes for the municipal community, including future generations;
 - (c) the economic, social and environmental sustainability of the municipal district, including mitigation and planning for climate change risks, is to be promoted;
 - (d) the municipal community is to be engaged in strategic planning and strategic decision making;
 - (e) innovation and continuous improvement is to be pursued;
 - (f) collaboration with other Councils and Governments and statutory bodies is to be sought;
 - (g) the ongoing financial viability of the Council is to be ensured;
 - (h) regional, state and national plans and policies are to be taken into account in strategic planning and decision making;
 - (i) the transparency of Council decisions, actions and information is to be ensured.
 - (3) In giving effect to the overarching governance principles, a Council must take into account the following supporting principles—
 - (a) the community engagement principles;
 - (b) the public transparency principles;
 - (c) the strategic planning principles;
 - (d) the financial management principles;
 - (e) the service performance principles.
19. As can be seen by the above objectives and principles of the LG Act (and other provisions in that Act),¹ public transparency in council decision making and the exercise of statutory and administrative functions and powers is a key focus of the Act.
20. However, principles regarding the object of transparency under the LG Act may be subject to the secrecy provision in section 125(1) of the LG Act.

¹ See for example, sections 57 and 58 of the LG Act.

21. Section 125 provides:

125 Confidential information

(1) Unless subsection (2) or (3) applies, a person who is, or has been, a Councillor, a member of a delegated committee or a member of Council staff, must not intentionally or recklessly disclose information that the person knows, or should reasonably know, is confidential information.

Penalty: 120 penalty units.

(2) Subsection (1) does not apply if the information that is disclosed is information that the Council has determined should be publicly available.

(3) A person who is, or has been, a Councillor, a member of a delegated committee or a member of Council staff, may disclose information that the person knows, or should reasonably know, is confidential information in the following circumstances—

- (a) for the purposes of any legal proceedings arising out of this Act;
- (b) to a court or tribunal in the course of legal proceedings;
- (c) pursuant to an order of a court or tribunal;
- (d) in the course of an internal arbitration and for the purposes of the internal arbitration process
- (e) in the course of a Councillor Conduct Panel hearing and for the purposes of the hearing;
- (f) to a Municipal Monitor to the extent reasonably required by the Municipal Monitor;
- (g) to the Chief Municipal Inspector to the extent reasonably required by the Chief Municipal Inspector;
- (h) to a Commission of Inquiry to the extent reasonably required by the Commission of Inquiry;
- (i) to the extent reasonably required by a law enforcement agency.

22. The secrecy provision in section 125(1) of the LG Act 2020 replaces the secrecy provision in the former *Local Government Act 1989* (Vic).

23. Section 125(1) of the LG Act changes the way a council must process certain FOI requests as it prohibits the disclosure of 'confidential information', which includes personal affairs information in documents held by a council.

24. Therefore, it is appropriate for me to first consider whether the Document subject to review is exempt under section 38 of the FOI Act in conjunction with section 125(1) of the LG Act.

Review of exemptions

Section 38 – Secrecy provision

25. A document is exempt under section 38 if the following three requirements are met:

- (a) there is an enactment in force;
- (b) the enactment applies specifically to the kind of information in a document; and
- (c) the enactment prohibits persons, referred to in the enactment, from disclosing that specific kind of information (either absolutely or subject to exceptions or qualifications).

26. For section 38 to apply to a document, an enactment must be formulated with such precision that it specifies the actual information sought to be withheld.

Is there an enactment in force?

27. I am satisfied the LG Act is an enactment in force for the purpose of section 38 of the FOI Act, and the first requirements of section 38 is met.

Does the enactment apply specifically to the kind of information in the document?

28. 'Confidential Information' in section 125 of the LG Act is defined in section 3(1) of that Act and includes under paragraph (f):

(f) personal information, being information which if released would result in the unreasonable disclosure of information about any person or their personal affairs;

29. In determining if the Document contains 'personal information' within the meaning of section 3(1)(f) of the LG Act and 'confidential information' for the purposes of section 125(1) of the LG Act, I have had regard to similar considerations that arise under section 33(1) of the FOI Act. Under section 33(1), a document is exempt from release if:

- (a) its disclosure would 'involve' the disclosure of information relating to the 'personal affairs' of a person other than the Applicant (or personal affairs information);² and
- (b) disclosure of the personal affairs information would be 'unreasonable' in the circumstances.

Does the Document contain 'personal information' for the purposes of section 125(1) of the LG Act?

30. Information relating to the 'personal affairs' of a person includes information that identifies any person or discloses their address or location. It also includes any information from which such information may be reasonably determined.³

31. I accept 'personal information' may encompass a broad range of information concerning an individual. For example, their name, address, correspondence or details about their property, or other personal details.

32. In its fresh decision, the Agency states:

The pages exempted [...] contain internal building plans and the property in question is a private residential dwelling. I am satisfied that the information contains sufficient detail that it can be considered personal information of the property owner.

33. The Document subject to review comprises of building plans concerning land owned by a third party. I am satisfied it contains 'personal information' concerning the third party property owner for the purposes of section 125(1) of the LG Act.

Would disclosure of the 'personal information' be unreasonable in the circumstances?

34. The concept of 'unreasonable disclosure' involves balancing the public interest in the disclosure of official information with the interest in protecting the personal privacy of a person in the particular circumstances.⁴ I consider this approach is also relevant when determining whether information in a document constitutes 'confidential information' for the purposes of section 125(1) of the LG Act.

² Sections 33(1) and (2).

³ Section 33(9).

⁴ *Re Page v Metropolitan Transit Authority* (1988) 2 VAR 243 at 245-6.

35. In the Victorian Court of Appeal decision in *Victoria Police v Marke*,⁵ it was held there is ‘no absolute bar to providing access to documents which relate to the personal affairs of others’, and the exemption under section 33(1) ‘arises only in cases of unreasonable disclosure’ and ‘[w]hat amounts to an unreasonable disclosure of someone’s personal affairs will necessarily vary from case to case’.

36. As also stated in *Victoria Police v Marke*, ‘[t]he protection of privacy, which lies at the heart of s 33(1), is an important right that the FOI Act properly protects. However, an individual’s privacy can be invaded to a lesser or greater degree’.⁶

37. In determining whether disclosure of the information would be unreasonable in these circumstances, I have had regard to the following factors:

(a) The nature of the personal information and the circumstances under which it was obtained by the Agency

The exempt information is the internal building floor plans of a third party’s residential dwelling. Specifically, the information subject to review is the ground floor plans and floor dimension.

The information was provided to and collected by the Agency in the context of its role in administering the relevant building permit application process under Victorian building and planning legislation and regulations.

(b) The Applicant’s interest in the information

The Applicant submits it custom designed a set of residential building plans for the third party and had no further contact with them on completion of the plans. The Applicant believes the requested building plans, which were submitted by the third party to the Council for the purpose of obtaining a planning permit, may infringe its copyright and seeks to assess the plans prior to pursuing possible legal action to enforce its copyright.

(c) The likelihood of further disclosure if the information is released

The nature of disclosure under the FOI Act is unconditional and unrestricted, which means an applicant is free to disseminate widely or use a document as they choose once it is released.⁷

Accordingly, I have considered the likelihood of the personal affairs information in the document being further disseminated, if disclosed, and the effects broader disclosure of this information would have on the privacy of the relevant third parties.

(d) Whether any public interest would be promoted by disclosure

The nature of the Applicant’s interest in obtaining access to the documents in full is a matter of private interest. There is no information before me that any public interest would be promoted by release of the third parties’ personal affairs information in the Document.

(e) Whether the individuals to whom the information relates object or would be likely to object to the disclosure of the information

The third party to whom the information relates objects to the disclosure of their personal affairs information under the FOI Act. While not a determinative factor, in the context of this matter, I have given weight to their view.

⁵ [2008] VSCA 218 at [76].

⁶ *Ibid* at [79].

⁷ *Ibid* at [68].

Given the nature of the information, I accept it is reasonably likely the third party would expect their personal information in the Document will be used and disclosed only in connection with the Agency's regulatory responsibilities and not released to a third party under the FOI Act.

- (f) Whether the disclosure of information relating to the personal affairs of any person would, or would be likely to, endanger the physical life and safety of any person⁸

There is nothing in the information before me to suggest the safety of any person is a relevant concern in this case.

38. Having weighed up the above factors, I am satisfied disclosure of the 'personal information' in the Document would be unreasonable in the circumstances for the purposes of section 125(1) of the LG Act, and the second requirement of section 38 is met.

Does the enactment prohibit persons, referred to in the enactment, from disclosing that specific kind of information (either absolutely or subject to exceptions or qualifications)?

39. I am satisfied section 125(1) of the LG Act prohibits a person who is, or has been, a Councillor, a member of a delegated committee or a member of Council staff from disclosing Council 'confidential information' subject to the exceptions in sections 125(2) and 125(3) of the LG Act.
40. Having considered the exceptions to the prohibition on disclosure under sections 125(2) and 125(3) of the LG Act, I am satisfied none of these exceptions apply in these circumstances.
41. Accordingly, I am satisfied section 125(1) of the LG Act prohibits the Agency through its officers from disclosing the Document to the Applicant, and the third requirement of section 38 is met.

Conclusion on the application of section 38

42. In relation to section 38 of the FOI Act, I am satisfied:
- (a) section 125 of the LG Act is an enactment in force;
 - (b) the Document contains 'personal information' as defined in section 3(1)(f) of the LG Act for the purposes of the definition of 'confidential information' in section 125(1) of the LG Act; and
 - (c) section 125(1) of the LG Act prohibits Agency officers, Councillors and Council officers, from disclosing the 'confidential information' in the Document and none of the permitted exceptions to this prohibition apply in this case.
43. Accordingly, I am satisfied the information exempted by the Agency in the Document is exempt from release under section 38 of the FOI Act in conjunction with section 125(1) of the LG Act.

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

44. Given the similarity between 'personal information' under section 3(1)(f) of the LG Act and the personal affairs exemption under section 33(1), I am satisfied the information exempt from release by the Agency under section 38 is also exempt under section 33(1).

Section 25 – Deletion of exempt or irrelevant information

45. 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.

⁸ Section 33(2B).

46. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'⁹ 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 25.¹⁰
47. I have considered the information the Agency deleted from the Document as irrelevant information. I agree it falls outside the scope of the Applicant's request as the Applicant agreed to exclude names from the scope of the request.
48. I am satisfied it is not practicable to delete the irrelevant and exempt information from the Document, as to do so would render the Document meaningless having considered the Applicant's purpose for seeking access to the Document.

Conclusion

49. On the information before me, I am satisfied the Document is exempt from release under sections 33(1) and 38 in conjunction with section 125(1) of the LG Act.
50. As I am not satisfied it is practicable to provide the Applicant with an edited copy of pages 3 and 4 of the document with irrelevant and exempt information deleted in accordance with section 25, access to these pages is refused in full.
51. Despite my decision, it is open to the Applicant to contact the Agency to discuss inspecting the Document at the Agency's premises, as both parties have indicated to OVIC during the review they would consider this option.

Review rights

52. If either party to this review is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.¹¹
53. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹²
54. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹³
55. 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.
56. 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.¹⁴

⁹ *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].

¹⁰ *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].

¹¹ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

¹² Section 52(5).

¹³ Section 52(9).

¹⁴ Sections 50(3F) and 50(3FA).