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## Notice of Decision and Reasons for Decision

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Applicant: 'CQ5'  
Agency: Moorabool Shire Council  
Decision date: 11 February 2021  
Exemption considered: Section 33(1)  
Citation:  
Citation: 'CQ5' and Moorabool Shire Council (*Freedom of Information*) [2021]  
VICmr 41 (11 February 2021)

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FREEDOM OF INFORMATION – fresh decision – residential building plans – floor plan – internal layout – copyright – personal affairs information of residential homeowner

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.

My decision on the Applicant's request is the same as the Agency's decision.

I am satisfied the personal affairs information in the document is exempt under section 33(1).

As it is practicable to delete irrelevant and exempt information in the document in accordance with section 25, I have determined to grant access to the document 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

11 February 2021

## Reasons for Decision

### Background to review

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

Any plans lodged on or after [month year] as part of a building permit with respect to a dwelling constructed at [address] (or [location]).
2. In its decision, the Agency identified one document falling within the terms of the Applicant's request to which it refused access under sections 30(1) and 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. Section 49M(1) permits an agency to make a fresh decision on an FOI request during a review.
5. On 18 December 2020, the Agency made a fresh decision within the required 28 day period under section 49M(2) and granted access to further information in the document.
6. The Agency's decision provided access to certain plans that reveal external details of the relevant building plans, but refused access to the internal floor plan under sections 33(1) and 34(1)(b).
7. 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.
8. I have examined a copy of the document subject to review.
9. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
10. I have considered all communications and submissions received from the parties.
11. 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.
12. 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.

### Review of exemptions

#### **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

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

- (b) such disclosure would be 'unreasonable'.
14. Section 33(9) defines 'information relating to the personal affairs of any person includes information' means information:
- (a) that identifies any person or discloses their address or location; or
- (b) from which any person's identity, address or location can reasonably be determined;
15. This means information relating to a person's personal affairs 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.<sup>2</sup>
16. 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 an individual other than the applicant (a third party) in the particular circumstances.
17. In determining whether the disclosure of a document would involve the unreasonable disclosure of information relating to the personal affairs of any person, I must take into account whether the disclosure of the information would, or would be reasonably likely to, endanger the life or physical safety of any person.<sup>3</sup> However, I do not consider this to be a relevant factor in the circumstances.
18. Where practicable to do so, an agency must notify a third party, whose personal affairs information appears in a document, of the FOI request and to seek their view as to whether disclosure of the document should occur. The Agency advised it consulted with a third party.
19. In relation to section 33(1), the Applicant submits:
1. While I understand that the Council felt compelled to follow OVIC's decision in *Metricon Homes Pty Ltd and Campaspe Shire Council (Freedom of Information) [2020] VICmr 29* (17 February 2020) (Metricon decision), it is [the Applicant's] view that:
    - a. a floor plan should not be considered to be information relating to the personal affairs of a person where the name of the person has been redacted and the address was provided by the applicant; or
    - b. in the alternative, the facts in the current case mean that the public interest in providing the floor plan outweighs the private interest in not providing the floor plan when considering whether the disclosure is unreasonable for the purposes of section 33(1) of the *Freedom of Information Act* (1982) (FOI Act).
  2. The Metricon decision forms the view in paragraph 18 that a floor plan amounts to information relating to the personal affairs of a person other than the applicant but does not explain why. The Council decision of [date] (Council decision) likewise does not identify why a floor plan amounts to the personal affairs of a person. The Council decision states in paragraph 14 that VCAT has held a document will disclose personal affairs information if the document is capable of, either directly or indirectly, identifying a particular individual whose personal affairs are disclosed. It says that as the nature of disclosure under the FOI Act is unrestricted and unconditional, this is to be interpreted by the capacity of any member of the public to potentially identify a third party. It then relies in paragraph 12 on the Metricon decision but does not provide any other reasoning as to why the floor plan amounts to personal affairs information, given that the floor plan, with the name of the person and builder redacted does not identify or potentially identify a third party.
  3. The disclosure of the floor plan with personal information redacted, is merely disclosure of a floor plan that was submitted as part of a building permit application for that address. It does not

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

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

even confirm that the floor plan does reflect the home built at that address. I provided the address to the Council so the provision of the floor plan does not provide me with that information of itself. If the address is the information that identifies or potentially identifies a third party, then I can do that already. In order to amount to personal affairs information according to paragraph 12 of the Metricon decision, surely the floor plan of itself needs to have some link to a person's identity?

4. The second element to be satisfied in order to rely on the section 33(1) exemption is that the disclosure needs to be unreasonable. Paragraph 16 of the Council decision states that this involves a balancing of the competing public interest of disclosing official information with the personal interest in privacy.
5. There is a public interest in upholding the copyright legislation and ensuring that people do not get away with infringing copyright. If the FOI exemption can be used, not just in this instance but in all similar instances, to prevent the disclosure of a potentially infringing floor plan, then I have no doubt that copyright infringement in this area will continue to rise on the basis that homeowners and their builders know that it will be difficult for the copyright owner to establish infringement without expensive pre-trial discovery applications.
6. In contrast, if privacy is the personal interest that needs to be balanced, then personal affairs information that is not private should be reasonable to disclose. Under the privacy legislation, the only information that is considered to be private is "information or an opinion about an identified individual, or an individual who is reasonably identifiable". Personal information that has been de-identified will no longer be personal information for the purpose of the *Privacy Act 1988* (Cth). The disclosure of the redacted floor plan will not disclose personal information as that term is defined under the Privacy Act. If the request to disclose a redacted floor plan for a particular address was made to a builder or draftsman, there would be no privacy concerns with disclosure of the redacted floor plan, although the builder may choose not to disclose the floor plan in circumstances where it may incriminate itself, such as in the current circumstance. Why should there be a higher threshold where the request is made under the FOI Act?
7. If the privacy legislation definition is not applied, but what is applied is something akin to the definition of "confidential information", where the person has built a home where that design is freely available on the internet, on the website of the builder or the person themselves through social media has provided details regarding the build, I would argue that the information can no longer be called private. If it is this definition of "personal information" that is applied, does this mean that the agency is required to check this first before relying on the exemption in section 33(1), or is it up to the applicant to provide these details so that the agency knows that the exemption is not applicable?
8. I do not believe that there is any confidentiality that needs to be maintained in the current instance as the builder has already made photographs of the home publicly available. [The Applicant] was provided with the information about the owner and builder and potential for copyright infringement by an anonymous source. I am therefore already aware of the identity of the builder of the home and the owner of the home from that source. The builder has a public Facebook page which provides internal photographs of the home that has been built at [address] ([location]), which is the address for which we have sought the floor plan. While this does not include a copy of the floor plan itself, the photographs do reveal the inner rooms of the home and how many (but not all of them) interrelate.
9. In the building of the home I imagine that copies of the floor plan were made available to multiple sub-contractors without any requirement that the floor plan be kept confidential, although there may have been a requirement that the name and address of the homeowner be kept private. As such, it would be hard to claim that the redacted floor plans constituted confidential information.
10. Paragraph 16 of the Metricon decision states that section 33 (2A) (whether disclosure would, or would be likely to, endanger the life or physical safety of a person) was not a relevant factor in that instance and presumably the same applies in this instance, where it is clear that [the

Applicant] does not intend to use the floor plan in a way that exposes the owner of the home to such concerns. As this appears to me to be the only reason that could possibly sway the balance of competing interests in favour of non- disclosure, I do not understand the basis on which disclosure is still denied if this is not seen as a relevant factor. The only consequence of the disclosure in the circumstances is that it enables [the Applicant] to form a view about whether copyright infringement is likely to have occurred or not, without putting the homeowner and [the Applicant] to the additional cost of defending/making a pre-trial discovery application.

11. Since receipt of the fresh decision, I have also informed the Council that I am happy to provide a statutory declaration stating that [the Applicant's] sole reason in requesting the document is to determine whether we have a cause of action in copyright infringement and that the only persons who will be shown a copy of the floor plan will be the owner and builder themselves, our external lawyers and a judge, should the matter proceed to Court. It is my view that this should overcome any concerns that the Council may have regarding the use to which the information will be put and is relevant to the balancing exercise which should result in the balance of the competing interests landing in favour of the public interest in disclosure rather than the private interest in refusing disclosure.

20. The Agency submits:

The decision by Council to deem the floorplans as exempt information under s.33(1) of the Act, was made after an initial discussion with the Office of the Victorian Information Commissioner on [date] and the subsequent analysis of a published decision by the Public Access Deputy Commissioner, Joanne Kummrow.

The published decision was in relation to a request from Metricon Homes Pty Ltd to Campaspe Shire Council, whereby the information being sought and parties to the request were directly comparative to the request received by Council, and the Notice of Decision was relatively recent, with a Decision Date of 17 February 2020.

In this circumstance, Council relied upon the Deputy Access Commissioner's decision as guidance of best practice in upholding the requirements of the Act and noted the satisfaction of the internal floor plan being classified as exempt under section 33(1), with access denied in full.

It is noted that the applicant provided an email on 12 January 2021 stating reasons for release of the information and, whilst I appreciate the position of the applicant, upon examination of the points raised in the email, I am of the understanding that although photos of the property in question may exist on a public social media site, the floor plan is not visible and the homes layout is not fully identifiable in the photos, which supports Council's decision to deem the floor plan as exempt information under s.33(1).

*Do internal floor plans of a residential building amount to personal affairs information?*

21. I note the Applicant's submission the internal floor plans of the house are not personal affairs information for the purposes of the FOI Act.
22. While the floor plan itself does not contain the identity of a person, or from which the identity of a person could be determined, 'personal affairs information' is not limited to those terms only. Rather, section 33(1) describes information 'relating to' personal affairs information. Therefore, I consider it is the intention of this phrase to be interpreted broadly.
23. I have determined the floor plans subject to this request amount to personal affairs information for the following reasons:
  - (a) internal floor plans for a residential building or home reflect the private and internal living space and layout of a homeowner; and
  - (b) such internal floor plans can reflect sensitive or personal matters.

*Would disclosure of such information be unreasonable in the circumstances?*

24. I have determined it would be unreasonable to disclose the personal affairs information in the document for the following reasons:
- (a) While I note the Applicant states there is a public interest in protecting copyright in the document, I consider its disclosure would serve a private interest only.
  - (b) The Applicant is aware of the relevant property address. Therefore, I consider the identify the residential homeowner is able to be discerned.
  - (c) There is no information before me regarding who the information has been shared with and on what terms.
  - (d) While I accept certain details about the internal floor plan are available on social media, I do not consider this information is sufficiently detailed so as to enable a person to reconstruct or discern the entire internal floor plan.
  - (e) As stated above, the decision of an individual to make public information of this nature is appropriately done so at their discretion and election only, rather than under the FOI Act.
  - (f) I note the Applicant submits the information will not be disclosed outside the limited purpose of determining whether copyright has been infringed. However, the nature of disclosure under the FOI Act is unrestricted and unconditional. This means an Applicant is able to use or further disseminate a document once released under the FOI Act.
25. Accordingly, I am satisfied the personal affairs information in the document sought by the Applicant, being internal floor plans, is exempt under section 33(1).

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

26. 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.
27. Determining what is ‘practicable’ requires consideration of the effort and editing involved in making the deletions ‘from a resources point of view’<sup>4</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>5</sup>
28. I have considered whether it is practicable to provide the Applicant with an edited copy of the document with irrelevant and exempt information deleted in accordance with section 25. I am satisfied it is practicable to do so as the required deletions would not require substantial time and effort, and the edited document would retain sufficient meaning.

**Conclusion**

29. On the information before me, I am satisfied the personal affairs information in the document is exempt under section 33(1).

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<sup>4</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>5</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].

30. As it is practicable to delete irrelevant and exempt information in the document in accordance with section 25, I have determined to grant access to the document in part.
31. As I have determined the information in the documents is exempt under section 33(1), it is not necessary for me to consider the application of section 34(1) to the same information.

### **Review rights**

32. If either party to this review is not satisfied with my decision, they are entitled to apply to the Victorian Civil and Administrative Tribunal (**VCAT**) for it to be reviewed.<sup>6</sup>
33. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.<sup>7</sup>
34. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.<sup>8</sup>
35. 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.
36. 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>9</sup>

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

<sup>7</sup> Section 52(5).

<sup>8</sup> Section 52(9).

<sup>9</sup> Sections 50(3F) and (3FA).

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	Number of Pages	Agency's Fresh Decision	OVIC Decision	OVIC Comments
1	Various	Building work document lodgement information for [address]	207	Release in part Sections 33(1), 34(1)(b), 25	<p><b>Release in part</b> <b>Section 33(1)</b></p> <p>The document is to be released except for the following exempt or irrelevant information, which is to be deleted in accordance with section 25.</p> <p>The following pages are irrelevant to the request:</p> <ul style="list-style-type: none"> <li>• 1-17, 20-71, 77-135, 155-157, 159-188.</li> </ul> <p>The following pages are exempt under section 33(1):</p> <ul style="list-style-type: none"> <li>• 74, 140, 143, 148, 150, 193, 196, 201, 203.</li> </ul>	<p>Much of the document is not relevant to the terms of the Applicant's request as it relates to other matters regarding the property, not specifically the plans requested by the Applicant.</p> <p>The pages of the document in scope are pages 74, 140, 143, 148, 150, 193, 196, 201 and 203.</p> <p><b>Section 33(1):</b> I have determined the pages of the document subject to review contain personal affairs information that would be unreasonable to release for the reasons set out above.</p> <p><b>Section 25:</b> I am satisfied it is practicable to provide an edited copy of the document to the Applicant with irrelevant and exempt information deleted in accordance with section 25.</p>