

## Notice of Decision and Reasons for Decision

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Applicant:	'FS2'
Agency:	City of Port Phillip
Decision date:	24 January 2025
Exemption considered:	Section 35(1)(b)
Citation:	'FS2' and City of Port Phillip (Freedom of Information) [2024] VICmr 51 (24 January 2025)

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FREEDOM OF INFORMATION – document prepared by a member of the public – [matter being considered by Council] – submission to community consultation – confidential submission – local government – public interest matter

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 a document requested by the Applicant under the FOI Act.

My decision on the Applicant's request differs from the Agency's decision. I have decided the document subject to this review is not exempt under section 35(1)(b) and is to be released in full.

Please refer to the end of the decision for information about review rights through the Victorian Civil and Administrative Tribunal (**VCAT**).

My reasons for decision follow.

Penny Eastman  
Public Access Deputy Commissioner

24 January 2025

## Reasons for Decision

### Background to review

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

[A document referred to by a member of the public at a Council meeting]
2. The Agency identified one document falling within the terms of the Applicant's request and refused access to the document in full under section 35(1)(b). The Agency's decision letter sets out the reasons for its decision.

### Review application

3. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
4. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
5. I have examined a copy of the document subject to review and considered relevant communications and submissions received from the parties.
6. 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.
7. 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 exemption

#### ***Section 35(1)(b) – Information obtained in confidence***

8. A document is exempt under section 35(1)(b) if two conditions are satisfied:
  - (a) disclosure would divulge information or matter communicated in confidence by or on behalf of a person or a government to an agency or a Minister; and
  - (b) disclosure would be contrary to the public interest as it would be reasonably likely to impair the ability of an agency or a Minister to obtain similar information in the future.

*First limb – was the information obtained in confidence?*

9. Whether information communicated by an individual to an agency was communicated in confidence is a question of fact.<sup>1</sup>
10. In doing so, it is necessary to consider the position from the perspective of the communicator, noting confidentiality can be expressed or implied from the circumstances of a matter.<sup>2</sup>
11. The requested document was prepared by a [third party], in support of their submission to a community consultation on a [matter being considered by Council]. Although the third party spoke to their submission during a public Council meeting, the document in question was not made available to members of the public.
12. I am satisfied the document was provided to the Agency with the implicit understanding that it was given in confidence, such that it would only be obtained and considered by the Agency and not made publicly available.

*Second limb – would disclosure of the information be contrary to the public interest?*

13. Section 35(1)(b) also requires I consider whether the Agency would be impaired from obtaining similar information in the future if the information were to be disclosed under the FOI Act. This involves considering whether others in the position of the communicator would be reasonably likely to be inhibited or deterred from providing similar information to the Agency in the future should the information be disclosed.
14. The public interest test in section 35(1)(b) is narrow, in that it is directed toward the impact release would have on an agency's ability to obtain the same type of information in the future. I note the exemption will not be made out if an agency's impairment goes no further than showing potential communicators of the information may be less candid than they would otherwise have been.<sup>3</sup>
15. The Agency's decision letter states:

Disclosure would undermine the trust and confidence which individuals expect of and place in the Council, and the confidential understanding on which they are willing to provide information on matters designed to inform the Council's decision-making processes.

Disclosure would be contrary to the public interest by reason that it would be reasonably likely to impair the ability of the Council to obtain information of a similar quantity or quality in future.
16. I acknowledge the importance of providing an option for public submissions to be made confidentially, particularly where matters are highly sensitive, and third parties may be concerned about their safety or wellbeing if the information is made publicly available.
17. I also acknowledge the Agency's concern that releasing the document could impair its ability to obtain information of a similar quantity or quality in future.

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<sup>1</sup> *Ryder v Booth* [1985] VR 869 at [883]; *XYZ v Victoria Police* [2010] VCAT 255 at [264].

<sup>2</sup> *XYZ v Victoria Police* [2010] VCAT 255 at [265], referring to *Barling v Medical Board of Victoria* (1992) 5 VAR 542, 561-562.

<sup>3</sup> *Smeaton v Victorian WorkCover Authority* [2012] VCAT 1549 at [69], approving *Birnbauer v Inner and Eastern Health Care Network* [1999] 16 VAR 9.

18. However, having reviewed submissions, publicly available information about the relevant Council meeting and the document submitted to this review, I do not consider there is sufficient information before me to demonstrate that releasing the document would likely impair the ability of the Agency to obtain submissions of a similar nature from members of the public in future.
19. It is important to note that each request made to an agency under the FOI Act must be considered on its own merits, and that releasing a document in this particular circumstance does not set a precedent for future submissions to be released on request.
20. In making my decision, I have considered the content and nature of the requested document, and the circumstances under which it was provided to the Agency:
  - (a) The third party who provided the document to the Agency spoke publicly in favour of their preferred option at the Council meeting on [date], and a recording is publicly available via the Agency's website. Although the document itself was not made publicly available, the third party's verbal submission contained details about the document, [and the third party's views]. Given the identity of the third party is known to the public and that certain details in the document are also known, I consider this reduces the sensitivity and confidentiality of the document.
  - (b) The document does not contain any personal affairs information or other content of a highly sensitive nature that would be reasonably likely to impact the safety or wellbeing of third parties.
  - (c) The Agency's website states that [a large number of] submissions were received during the consultation,<sup>4</sup> demonstrating the high level of public interest in this matter. The requested document relates to only one out of many views submitted in favour of the same option, and I note this option was not selected in the final decision.
  - (d) I am mindful of the [public profiles of the Applicant and the third party]. Nevertheless, this issue has evoked many strong views from members of the public during the consultation, and so, given the circumstances of the matter, I am not satisfied that releasing the requested document would impair the Agency's ability to obtain similar information in the future.
21. Accordingly, I am not satisfied the document is exempt from release under section 35(1)(b) of the FOI Act.

### Conclusion

22. My decision on the Applicant's request differs from the Agency's decision, in that I have decided to release the document in full, as I am not satisfied it is exempt from release under section 35(1)(b).

### Timeframe to seek a review of my decision

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<sup>4</sup> Footnote omitted.

23. If the Agency is not satisfied with my decision, they are entitled to apply to the VCAT for it to be reviewed.<sup>5</sup>
24. 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>
25. 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.
26. The Agency is required to notify the Information Commissioner in writing as soon as practicable if it applies to VCAT for a review of my decision.<sup>7</sup>

### Third party review rights

27. As I have determined to release a document claimed exempt under section 35(1)(b), if practicable, I am required to notify the relevant party of their right to seek review by VCAT of my decision within 60 days from the date they are given notice.<sup>8</sup>
28. In this case, I am satisfied it is practicable to notify the relevant third party of their review rights and confirm they will be notified of my decision on the date of decision.

### When this decision takes effect

29. My decision does not take effect until the third party's 60 day review period expires. If a review application is made to VCAT, my decision will be subject to any VCAT determination.

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<sup>5</sup> Section 50(3D).

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

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

<sup>8</sup> Sections 49P(5), 50(3AB) and 52(3).