

## Notice of Decision and Reasons for Decision

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Applicant:	'GA2'
Agency:	Manningham City Council
Decision date:	23 June 2025
Exemptions and provision considered:	Sections 33(1), 35(1)(b), 25
Citation:	'GA2' and Manningham City Council (Freedom of Information) [2025] VICmr 65 (23 June 2025)

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FREEDOM OF INFORMATION – residential property boundary – council approval of building to boundary – letter of decision to third party – plan of residential property

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 and more information is to be released.

Please refer to pages 7 and 8 for information about review rights through the Victorian Civil and Administrative Tribunal (**VCAT**).

My reasons for decision follow.

Penny Eastman  
**Public Access Deputy Commissioner**

23 June 2025

## Reasons for Decision

### Background to review

1. The Applicant made a request to the Agency seeking access to the documents. Following clarification with the Applicant, the request was for:

Building Permit documents that show the rationale regarding two rooms built [location] for the current dwelling on [specified residential address].
2. The Agency identified 2 documents falling within the terms of the Applicant's request and refused access to them under section 35(1)(b). The Agency's decision letter sets out the reasons for its decision.
3. The documents are:
  - (a) a letter, being pages 1 and 2 of the documents provided to OVIC
  - (b) a floor plan, being page 3 of the documents provided to OVIC.

### Review application

4. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
5. I have examined a copy 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 relevant 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'.<sup>1</sup> 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.

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<sup>1</sup> *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577, [591].

## Review of exemptions

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

11. I note the Applicant advised they are not seeking personal affairs information. However, as the definition of personal affairs information under the FOI Act is broad, I consider they do seek personal affairs information. Therefore, while the Agency did not apply section 33(1) to the documents, having considered their contents and the Agency's decision letter, I consider it is appropriate to consider whether it applies.
12. Section 33(1) protects an individual's privacy where their right to privacy outweighs the public interest in disclosing their information.<sup>2</sup> This will only occur when disclosing the individual's personal affairs information is unreasonable.
13. A document or information is exempt under section 33(1) if two conditions are satisfied:
  - (a) the document or information relates to the 'personal affairs' of a natural person (living or deceased)
  - (b) disclosure of that personal affairs information is unreasonable in all the circumstances.
14. For more information about section 33(1) see the FOI Guidelines.<sup>3</sup>

### *Do the documents contain personal affairs information of other individuals?*

15. The concept of personal affairs information is broad. Information will relate to the personal affairs of a person if it 'concerns or affects that person as an individual'.<sup>4</sup> This includes information relating to health, private behaviour, home life, or personal or family relationships of individuals.<sup>5</sup>
16. A document will indirectly disclose personal affairs information if it contains information from which any person's identity, address or location can reasonably be determined. This means that a document can be exempt under section 33(1) where the document itself does not contain personal affairs information, but its disclosure would reveal personal affairs information.
17. Personal affairs information can be revealed or indirectly disclosed by connecting or linking the information in the disclosed document with other information available to the applicant.<sup>6</sup>
18. I am satisfied the documents contain the personal affairs of third parties, being information in relation to a specified residential address.

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<sup>2</sup> *Victoria Police v Marke* [2008] VSCA 218.

<sup>3</sup> <https://ovic.vic.gov.au/freedom-of-information/foi-guidelines/section-33/>.

<sup>4</sup> *Hanson v Department of Education & Training* [2007] VCAT 123.

<sup>5</sup> *Re F and Health Department* (1988) 2 VAR 458, quoted in *RFJ v Victoria Police FOI Division* [2013] VCAT 1267 [103], [109].

<sup>6</sup> *Harrison v Victoria Police* [2022] VCAT 280, [153].

*Consultation*

19. The Agency is required to consult with affected third parties, unless it is not reasonably practicable to do so.

20. In its decision letter, the Agency advised:

I sought the views of an individual who indicated that the confidential information should not be disclosed, as the material provided to Council, was done so for the express purpose of building a new dwelling. Additionally, the third party advised that the release of such information would compromise their personal sense of security, particularly in relation to the Applicant having access to the details of their private residence.

*Would disclosure of the personal affairs information be unreasonable?*

21. In determining whether disclosure of the personal affairs information would be unreasonable in the circumstances, I have considered the following factors:<sup>7</sup>

- (a) the nature of the personal affairs information
- (b) the circumstances in which the information was obtained
- (c) the extent to which the information is available to the public
- (d) the Applicant's interest in the information
- (e) whether any public or important interest would be promoted by release of the information
- (f) whether the individuals to whom the information relates object, or would be likely to object, to the release of the information
- (g) whether disclosure of the information would or would be reasonably likely to endanger the life or physical safety of any person.
- (h) whether the disclosure would increase the risk to a primary person's safety from family violence.

22. I have determined that it would be unreasonable to disclose the plans that appear in the documents for the following reasons:

- (a) while some house layouts or floor plans are available online, there is no information that the one subject to review is publicly available
- (b) such floor plans can reveal information that the person to whom it belongs would consider sensitive and personal
- (c) I consider it likely the person to whom the information relates would object to its release

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<sup>7</sup> See <https://ovic.vic.gov.au/freedom-of-information/foi-guidelines/section-33/#would-disclosure-be-unreasonable>.

- (d) having considered the information provided by the Applicant, I do not consider disclosure would satisfy the reasons for the Applicant's request.
23. The floor plan on page 3 of the documents is therefore exempt under section 33(1).
24. I have determined other information in the documents, being most of the letter that is on pages 1 and 2, would not be unreasonable to release for the following reasons:
- (a) for the most part, the letter contains information about building regulations and the role of the Agency. While this relates to a residential property, I do not consider this to be sensitive personal information
  - (b) I note the objection from the person concerned; however, I do not consider the letter contains sensitive personal affairs information
  - (c) the letter also sets out a decision by the Agency that would be apparent to the Applicant
  - (d) I consider the public interest weighs in favour of disclosure where it provides transparency and accountability for the Agency's decision.
25. Most of the letter on pages 1 and 2 of the documents is therefore not exempt under section 33(1).
26. However, I have decided it is unreasonable to release the name and signature that appears on page 2 as there is no question regarding the authenticity of the letter, and the remainder of it is to be released. This information is therefore exempt under section 33(1).

***Section 35 – Documents containing material obtained in confidence***

27. Section 35 contains two exemptions that relate to information communicated in confidence by or on behalf of a person or a government to an agency or Minister.
28. The exemptions in section 35 do not apply to information acquired by an agency or Minister from a business, commercial or financial undertaking, where the information relates to trade secrets or other matters of a business, commercial or financial nature. This type of information is considered under section 34.
29. For more information about section 35 see the FOI Guidelines.<sup>8</sup>

***Consultation***

30. An agency or Minister must consult with the relevant third party or parties who communicated the information, before making a decision on the request, unless an exception applies, or if it is not reasonably practicable to.
31. Information about the Agency's consultation appears above.

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

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<sup>8</sup> <https://ovic.vic.gov.au/freedom-of-information/foi-guidelines/section-35/>.

32. As I have determined the floor plan exempt under section 33(1), I have only considered whether the letter is exempt under section 35(1)(b).
33. A document may be exempt under section 35(1)(b) if two conditions are satisfied:
- (a) disclosure would divulge information or matter:
    - (i) communicated in confidence
    - (ii) by or on behalf of a person or a government to an agency or a Minister
  - (b) disclosure would be contrary to the public interest because the disclosure would be reasonably likely to impair the ability of an agency or a Minister to obtain similar information in the future.

*Was the information obtained in confidence?*

34. Whether information was communicated in confidence is a question of fact,<sup>9</sup> determined from the perspective of the communicator.<sup>10</sup>
35. I am satisfied based on the Agency's consultation, that the information was provided to it in confidence.

*Would disclosure impair the ability of the Agency to obtain similar information?*

36. The term 'impair' is not defined in the FOI Act. However, case law suggests:
- (a) the degree of impairment must go beyond a trifling or minimal impairment<sup>11</sup>
  - (b) there must be an actual impairment to the ability of the agency to obtain similar information in the future<sup>12</sup>
  - (c) it is not enough that individuals would be less candid than they otherwise might be<sup>13</sup> or would feel resentment at having their confidence betrayed<sup>14</sup>
  - (d) the necessary level of impairment will be made out if a significant minority of persons in the relevant group would be firmly resistant to providing similar information in the future<sup>15</sup>
  - (e) it is the agency that must be impaired from receiving information, not simply a

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<sup>9</sup> *Ryder v Booth* [1985] VR 869, 883.

<sup>10</sup> *XYZ v Victoria Police* [2010] VCAT 255, [265]; *Barling v Medical Board of Victoria* (1992) 5 VAR 542, 561-562.

<sup>11</sup> *Ryder v Booth* [1985] VR 869, 880.

<sup>12</sup> *Birnbauer & Davies v Inner & Eastern Health Care Network* [1999] VCAT 1363, [68] referring to *Ryder v Booth* [1985] VR 869.

<sup>13</sup> *Birnbauer & Davies v Inner & Eastern Health Care Network* [1999] VCAT 1363, [68]; approved in *Smeaton v Victorian WorkCover Authority* [2012] VCAT 1549, [69].

<sup>14</sup> *Sifredi v Medical Practitioners Board* [1999] VCAT 87 (affirmed on appeal *Medical Practitioners Board of Victoria v Sifredi* [2000] VSC 33);

<sup>15</sup> *Ibid*

reluctance on the part of a supplier to provide information<sup>16</sup>

- (f) the existence of a statutory duty to provide information does not necessarily exclude the possibility that disclosure would be reasonably likely to impair an agency's ability to obtain similar information in the future, particularly where disclosure might impact the quality and quantity of any future information provided.<sup>17</sup> In comparison, an agency will not be impaired from obtaining a specific type of information in future, if there is legislation which compels a person to provide this type of information to the agency.<sup>18</sup>

37. I am not satisfied disclosure of the letter would impair the ability of the Agency to obtain similar information in the future for the following reasons:

- (a) while I note the factor in paragraph 36(f) is relevant, in this instance, where the Agency has a regulatory role that members of the public must engage with, I do not consider disclosure will have any impact on it receiving information regarding similar requests in the future
- (b) I do not consider the decision or the reasons for decision is sensitive
- (c) the outcome of the request is known by the Applicant
- (d) the builder does not object to disclosure.

38. I have therefore decided the letter on pages 1 and 2 of the documents is not exempt under section 35(1)(b).

## Conclusion

39. My decision is as follows:

- (a) The name and signature in the letter on page 2 of the documents is exempt under section 33(1). The remainder of the letter on pages 1 and 2 of the documents is not exempt under sections 33(1) or 35(1)(b) and is to be released to the Applicant.
- (b) The floor plan, being on page 3 of the documents, is exempt under section 33(1) and access is refused in full as it is not practicable to edit it to delete exempt information.

## Timeframe to seek a review of my decision

40. If either party to this review is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.<sup>19</sup>

41. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.<sup>20</sup>

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<sup>16</sup> *Kosky v Department of Human Services* [1998] VCAT 290, [22].

<sup>17</sup> See *Thwaites v Department of Health and Community Services* (1995) 8 VAR 361, 370; *Woodford v Ombudsman* [2001] VCAT 721, [99]-[101].

<sup>18</sup> *Barling v Medical Board (Vic)* (1992) 5 VAR 542, 565.

<sup>19</sup> The Applicant in section 50(1)(b) and the Agency in section 50(3D).

<sup>20</sup> Section 52(5).

42. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.<sup>21</sup>
43. 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.
44. 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>22</sup>

#### **Third party review rights**

45. As I have determined to release documents that contain the personal affairs information of persons other than the Applicant, if practicable, I am required to notify those persons of their right to seek review by VCAT of my decision within 60 days from the date they are given notice.<sup>23</sup>
46. As the builder did not object to disclosure, notification is not required for that third party.
47. 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**

48. 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>21</sup> Section 52(9).

<sup>22</sup> Sections 50(3F) and 50(3FA).

<sup>23</sup> Sections 49P(5), 50(3), 50(3AB) and 52(3).