

## Notice of Decision and Reasons for Decision

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| Applicant:                           | 'FZ2'   |
| Agency:                              | City of Boroondara  |
| Decision date:                       | 31 March 2025   |
| Exemptions and provision considered: | Sections 30(1), 34(4)(a)(ii), 25  |
| Citation:                            | 'FZ2' and City of Boroondara (Freedom of Information) [2025] VICmr 56 (31 March 2025) |

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FREEDOM OF INFORMATION – Kew Recreation Centre – roof collapse – commissioned reports – subject to ongoing litigation – agency engaged in trade or commerce

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.

On the information before me, I am satisfied Documents 1 and 2 are exempt from release under section 30(1) and Documents 3 and 4 are exempt from release under section 34(4)(a)(ii). As such, my decision on the Applicant's is the same as the Agency and the documents are refused in full.

Please refer to page 9 for information about review rights through the Victorian Civil and Administrative Tribunal (**VCAT**).

My reasons for decision follow.

Penny Eastman  
**Public Access Deputy Commissioner**

31 March 2025

## Reasons for Decision

### Background to review

1. The Applicant made a request to the Agency seeking access to certain documents. Following clarification, the request was agreed as:
  1. Any expert report provided to, or commissioned by, Council that deals with the cause of the collapse of the roof structure of the Kew Recreation Centre during construction.
  2. The revised design submitted and/or final construction method proposed to ensure a safe final structure. Drafts are not required where there is a final document.
  3. The most current report, or correspondence, that states the projected total cost and time implications for the completion of the project.
  4. The most current report, or correspondence, that states the proposed source of funds to achieve that objective.
2. The Agency identified seven documents falling within the terms of the Applicant's request and released one document in full and denied access to the remaining six documents in full. In denying access to the six documents, the Agency relied on sections 30(1) and 34(4)(a)(ii). The Agency's decision letter sets out the reasons for its decision.

### Additional background

3. The Agency published information on its website regarding the substantive issue subject of the request, as follows:

On Monday 24 February 2025, there were steps taken in the 2 separate proceedings relating to the collapse of the steel roof structure at the centre in October 2022.

The first was a filing hearing initiated by the Victorian Building Authority (VBA). The VBA filed several charges against ADCO Group and a director within the company. This was a largely administrative hearing and is the first step in the VBA's prosecution of the charges which it has issued. You can read more about the VBA's charges in the VBA's media release.

The second was a committal mention in the charges which have been brought by WorkSafe Victoria against ADCO Group and Colab Building Tech Pty Ltd. Yesterday the committal mention was administratively adjourned. The committal mention has now been listed for hearing on Monday 19 May 2025. You can read more about the WorkSafe Victoria charges in WorkSafe Victoria's media release.

Our focus is on delivering this important facility for our community safely and as soon as possible. While the prosecutions continue, we can't comment further on the cause and responsibilities for the collapse, but we will keep our community informed about progress on site. For more information about the redevelopment and to stay up to date, visit our Kew Recreation Centre redevelopment page.<sup>1</sup>

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<sup>1</sup> <https://www.boroondara.vic.gov.au/your-council/news-and-media/boroondara-news/update-worksafe-and-victorian-building-authoritys-prosecution>.

## Review application

4. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access to Documents 1 to 4. The Applicant did not request review of Documents 5 to 7.
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.

## Review of exemptions

### *Section 30(1) – Internal working documents*

10. For more information about section 30 see the FOI Guidelines.<sup>2</sup>
11. Section 30(1) exempts documents that contain opinion, advice or recommendation, or consultation or deliberation, where disclosure would be contrary to the public interest. A document is not exempt simply because it is an internal working document.<sup>3</sup>
12. To be exempt under section 30(1), three conditions must be satisfied:
  - (a) the document or information is matter in the nature of:
    - (i) opinion, advice or recommendation prepared by an agency officer or a Minister; or
    - (ii) consultation or deliberation that has taken place between agency officers or Ministers; and
  - (b) the matter was created during the deliberative process of an agency, Minister, or the government's functions; and
  - (c) disclosure of the matter would be contrary to the public interest.

<sup>2</sup> <https://ovic.vic.gov.au/freedom-of-information/foi-guidelines/section-30/>.

<sup>3</sup> *Graze v Commissioner of State Revenue* [2013] VCAT 869, 25.

13. There are four circumstances where section 30(1) does not apply:
- (a) documents required to be made available for inspection and purchase under section 8;
  - (b) purely factual information;
  - (c) certain documents relating to adjudicative functions; and
  - (d) documents more than 10 years old.
14. The term 'officer' is defined in section 5(1). It includes independent contractors, consultants and legal advisers engaged by an agency to carry out work or provide services.<sup>4</sup>

*Do the documents contain opinion, advice or recommendation, or consultation or deliberation?*

15. The Agency applied section 30(1) to exempt Documents 1 and 2. Documents 1 and 2 are reports commissioned by the Agency to report on the collapse of the roof at Kew Recreation Centre.
16. In this case, a consultant or contractor is considered an agency officer for the purposes of the FOI Act.
17. I am satisfied the information is opinion, advice or the recommendation prepared by an agency officer.

*Was the matter created during the deliberative process of an agency, Minister, or the government's functions?*

18. Further, I am satisfied the information was created during the deliberative processes of the Agency, being responding to an event at an Agency property.

*Would disclosure of the documents be contrary to the public interest?*

19. In deciding whether disclosure of the information would be contrary to the public interest, I have given weight to the following relevant factors:<sup>5</sup>
- (a) the right of every person to gain access to documents under the Act;
  - (b) the sensitivity of the issues involved and the broader context of how the documents were created;
  - (c) the stage of a decision or policy development at the time the communications were made;
  - (d) whether disclosure of the documents would be likely to inhibit communications between agency officers that are essential for the agency to make an informed and well-

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<sup>4</sup> *Mees v University of Melbourne* (General) [2009] VCAT 782, [31].

<sup>5</sup> See <https://ovic.vic.gov.au/freedom-of-information/foi-guidelines/section-30/#disclosure-would-be-contrary-to-the-public-interest>.

considered decision or for those officers to properly participate in a process of the agency's functions (such as an audit or investigation, regulatory or law enforcement function);

- (e) whether disclosure of the documents would give merely a part explanation, rather than a complete explanation, for the taking of a particular decision or the outcome of a process, but only where the agency would not otherwise be able to explain upon disclosure of the documents;
  - (f) the impact of disclosing documents in draft form, including disclosure not clearly or accurately representing a final decision by an agency or Minister;
  - (g) the likelihood that disclosure would inhibit the independence of officers, including their ability to conduct proper research and make detailed submissions;
  - (h) the public interest in the community being better informed about an agency's deliberative, consultative and decision-making processes;
  - (i) the public interest in government transparency and accountability by enabling scrutiny or criticism of decisions and the decision-making process and building the community's trust in government and its decision-making processes;
  - (j) whether there is controversy or impropriety around the decision or the decision-making process.
20. In its decision letter, the Agency advised disclosure would be contrary to the public interest as the documents contain commercial information and disclosure would 'prejudice council's position in commercial negotiations if prematurely released'.
21. I also note the part of the information published by the Agency stating that 'While the prosecutions continue, we can't comment further on the cause and responsibilities for the collapse...'.
22. In summary, the Applicant submits:
- (a) they are concerned about the secrecy of any investigation undertaken regarding the event;
  - (b) the public release of all material is important to ensure that the mistakes in the initial design are not repeated;
  - (c) disclosure is in the public interest;
  - (d) embarrassment is not a valid reason to withhold the documents;
  - (e) the public good in disclosure outweighs any disadvantage to the parties involved;
  - (f) if necessary information can be redacted from the documents.
23. I have decided it would be contrary to the public interest to disclose the information in the documents for the following reasons:

- (a) I note the small amount of publicly available information currently available about the roof collapse, and the recent laying of charges to parties involved in the matter.
  - (b) In these circumstances I consider the documents to be sensitive. I also consider the documents remain current due to the ongoing nature of legal matters arising from the event.
  - (c) While I do not know if the applicant has any intention of disseminating the documents, I consider the further disclosure of the documents at this stage has the potential to disrupt legal proceedings on foot.
  - (d) I agree with the Agency's statement that it would be inappropriate to provide further information about the cause and responsibilities of the event while litigation continues.
  - (e) Given the legal matters on foot, I also consider disclosure could affect both WorkSafe's and the Victorian Building Authority's regulatory involvement in the matter.
24. As advised by the Agency, should the legal matters arising from this issue be resolved, the documents may become less sensitive and therefore may be available in the future.
25. While I agree with the Applicant that the public interest generally weighs in favour of disclosure of government held information, in circumstances where complex legal matters are yet to be resolved, and each party to those matters seek to protect their interests (including the Agency in carefully managing public expenditure) the public interest weighs against disclosure under the FOI Act at this time.
26. I am therefore satisfied Documents 1 and 2 are exempt, in full, under section 30(1).

***Section 34 – Documents relating to trade secrets etc.***

27. For more information about section 34 see the FOI Guidelines.<sup>6</sup>

***Section 34(4)(a)(ii) – Information that would expose the Agency unreasonably to disadvantage***

28. A document is exempt under section 34(4)(a)(ii) if:
- (a) the agency is engaged in trade or commerce;
  - (b) the document contains information of a business, commercial or financial nature; and
  - (c) disclosure of the document would be likely to expose the agency unreasonably to disadvantage.

*Is the Agency engaged in trade and commerce?*

29. The Agency applied section 34(4)(a)(ii) to Documents 3 and 4.

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<sup>6</sup> <https://ovic.vic.gov.au/freedom-of-information/foi-guidelines/section-34/>.

30. Trade or commerce activities must ‘of their nature, bear a trading or commercial character’.<sup>7</sup>
31. Whether an agency is engaged in trade or commerce depends on the facts and circumstances of each case.<sup>8</sup> It requires clear evidence that the agency is doing more than delivering government services or functions.
32. The Agency advises that it is engaged in trade or commerce in relation to the documents subject to this review. The Kew Recreation Centre provides leisure services, including gym and fitness classes that compete with other such privately run facilities. The construction process is part of the competitive process, given the cost of building the facility is part of its commercial activity.
33. I accept the Agency is engaged in trade or commerce in this particular instance.

*Do the documents contain information of a business, commercial or financial nature?*

34. Further, I accept that the documents contain information of a business nature, being reports relating to its provision of a leisure centre.

*Would disclosure be likely to expose the Agency unreasonably to disadvantage?*

35. Tribunals and courts describe ‘disadvantage’ in terms of the business, commercial or financial implications of disclosure. In particular, whether disclosure is likely to:
  - (a) reduce an agency’s capacity to compete in a competitive market for buying and selling goods or services;<sup>9</sup>
  - (b) reduce an agency’s capacity to negotiate future commercial contracts;<sup>10</sup>
  - (c) strengthen the bargaining position of entities the agency negotiates with, at the expense of the agency competing for marketplace share;<sup>11</sup> or
  - (d) expose the rates that an agency is prepared to accept for various services – and if so, the likely impact on the agency’s operations.
36. Whether disadvantage would be unreasonable involves the consideration of all circumstances, including factors both in favour of, and against disclosure, such as:<sup>12</sup>
  - (a) the nature of the information;
  - (b) whether there is any public interest in disclosure or nondisclosure;

<sup>7</sup> *Gibson v Latrobe City Council* [2008] VCAT 1340; *Concrete Constructions (NSW) Pty Ltd v Nelson* [1990] HCA 17; (1990) 169 CLR 594, 604.

<sup>8</sup> *Stewart v Department of Tourism, Sport and the Commonwealth Games* [2003] VCAT 45, [41].

<sup>9</sup> *Binnie v Department of Industry, Technology & Resources* (1986) 1 VAR 345, 348.

<sup>10</sup> *Ibid*; *Davis v Department of Transport* [2022] VCAT 721, [58].

<sup>11</sup> *Save Albert Park Inc v Australian Grand Prix Corporation* [2008] VCAT 168, [77].

<sup>12</sup> *Fitzherbert v Department of Health and Human Services* [2019] VCAT 201, [61].

- (c) the circumstances in which the information was obtained or created;
  - (d) whether the information has any current relevance; and
  - (e) the identity of the applicant and the likely motives of the applicant.
37. The word ‘unreasonably’ should be seen in the context of the balancing process between competing factors of the interest in maintaining confidentiality and the interest in public accountability and transparency on the part of the government, its departments and agencies, and entities that provide government services.<sup>13</sup>
38. I have decided it would expose the Agency unreasonably to disadvantage for the following reasons:
- (a) I am satisfied that disclosure, at this point in time, would impact the ability of the Agency to compete in the delivery of leisure services, in that disclosure may financially harm the Agency and inhibit its ability to complete the centre.
  - (b) As described above, I do not consider disclosure is in the public interest.
  - (c) Given the circumstances, I consider the documents were provided to the Agency with the expectation they would remain confidential.
  - (d) Also as described above, I consider the documents remain sensitive at this point in time.
  - (e) While I acknowledge the reason the Applicant seeks the documents, and that they are not commercial competitors, I consider the above factors weigh strongly against disclosure.
39. I am therefore satisfied Documents 3 and 4 are exempt under section 34(4)(a)(ii).

#### ***Section 25 – Deletion of exempt or irrelevant information***

40. 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.
41. Deciding whether it is ‘practicable’ to delete exempt or irrelevant information requires an agency or Minister to consider:
- (a) the effort involved in making the deletions from a resources point of view;<sup>14</sup> and
  - (b) the effectiveness of those deletions – that is, whether the edited document still has meaning.<sup>15</sup>

<sup>13</sup> *Asher v Department of innovation, Industry and Regional Development* [2005] VCAT 2702, [38].

<sup>14</sup> *Mickelborough v Victoria Police* [2009] VCAT 2786, [31]; *The Herald and Weekly Times Pty Limited v The Office of the Premier (General)* [2012] VCAT 967, [82].

<sup>15</sup> *Honeywood v Department of Human Services* [2006] VCAT 2048, [26]; *RFJ v Victoria Police FOI Division (Review and Regulation)* [2013] VCAT 1267, [140], [155]; *Re Hutchinson and Department of Human Services* (1997) 12 VAR 422.



42. As the Applicant advised they would accept the documents with information redacted from them, I have carefully considered whether exempt information could be deleted from the documents. In my view, it is not practicable for the Agency to delete exempt information from the documents given the technical aspects of the reports and the likelihood they will be thoroughly interrogated. In my view, if all exempt material was deleted from the documents they would become meaningless or at least remove the information the Applicant is specifically seeking.

### Conclusion

43. On the information before me, I am satisfied Documents 1 and 2 are exempt under section 30(1) and Documents 3 and 4 are exempt from release under section 34(4)(a)(ii).
44. As I am satisfied it is not practicable to provide the Applicant with an edited copy of the documents with exempt information deleted in accordance with section 25, access is refused in full.

### Timeframe for the Applicant to seek a review of my decision

45. If the Applicant to this review is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.<sup>16</sup>
46. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.<sup>17</sup>
47. 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.
48. The Agency is required to notify the Information Commissioner in writing as soon as practicable if the Applicant applies to VCAT for a review of my decision.<sup>18</sup>
49. If a review application is made to VCAT, my decision will be subject to any VCAT determination.

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<sup>16</sup> Section 50(1)(b).

<sup>17</sup> Section 52(5).

<sup>18</sup> Section 50(3FA).