

Notice of Decision and Reasons for Decision

Applicant:	'AY8'
Agency:	Maribyrnong City Council
Decision Date:	30 December 2019
Exemptions considered:	Sections 30(1), 32(1)
Citation:	'AY8' and Maribyrnong City Council (<i>Freedom of Information</i>) [2019] VICmr 225 (30 December 2019)

FREEDOM OF INFORMATION – council documents – masterplan – lease proposal – public park – public land – draft document – communicated in confidence – legal professional privilege

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 the document requested by the Applicant under the FOI Act.

My decision on the Applicant's request differs from the Agency's decision in that I have decided to release additional information in the document.

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner

30 December 2019

Reasons for Decision

Background to review

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

I seek access to the following document(s) under the Freedom of Information Act 1982, dated/created between [date] and [date]

1. Memorandum of Understanding between [named business undertaking] and the Council regarding the [suburb] Park masterplan
2. Any documents pertaining environmental, economic and community benefits or detriments regarding the amendments to the [suburb] park masterplan.
3. Any document or information regarding any benefit that any councillor, council staff member, or a family member of the previously named people, may personally derive from the proposed lease to the [named business undertaking].
4. Any document that refers to any terms, draft terms or proposed terms of any future lease or licence agreement with the [named business undertaking].

2. On [date], the Applicant amended their request as follows:

... it is only regarding proposed amendments.

I can confirm we are only seeking documents.

Regarding the dates, this would need to be amended to [year] rather than [year].

Re personal connection, we would ask of any document relating to any staff member that has done or will do any work in relation to writing any report, preparing any recommendation to council, preparing any document that will go to the councillors or is likely to have any involvement in the preparation for the decision, or the advancement work after any decision of council to vote "yes" to the proposed amendments.

3. In its decision, the Agency identified several documents falling within the terms of the Applicant's request. It released documents sought by the Applicant in items 1 and 2 of the request outside the FOI Act and refused access to one document in relation to item 4. In relation to item 3, the Agency determined no documents exist.

Review

4. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access to one document in full.
5. I have examined a copy of the one document to which access was refused in full by the Agency and is 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 all communications and submissions received from the parties, including:
 - (a) the Agency's decision on the FOI request;
 - (b) information provided with the Applicant's review application;

- (c) the Agency's submission dated 15 October 2019; and
 - (d) communications between the Applicant, Agency and OVIC staff during the review.
8. The document subject to review comprises nine pages and includes a one page schedule. In summary, the document sets out draft terms between the Agency and a named business undertaking (**Document**). Eight pages of the Document were prepared by the Agency's external legal representative. The schedule was prepared by the Agency and provided to its external legal representative for inclusion in the document.
9. 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.

Submissions

10. I note the Applicant did not provide a submission in relation to this review.
11. The Agency, in its submission, stated:

Section 34 – Documents relating to trade secrets

By way of background, at present and at the time of the request Council has been undertaking community consultation in relation to a proposed Masterplan for [suburb] Park which includes a proposal to lease a section of [suburb] Park to the [named business undertaking]. Subsequently this has generated a large amount of public interest in the proposal with strong opinions both against and in favour. The exempted document was created by Council's legal representative for use in Council's ongoing negotiations with the [named business undertaking] of a potential lease agreement.

As the document includes commercial information, I am satisfied that disclosure of the document, which is in draft form, would be unreasonable as it may affect any potential future negotiations for use of the site with [named business undertaking].

Therefore, access was denied to those parts of the document on the basis of the operation of S34(4) of the FOI Act.

Section 32 – Documents affecting legal proceedings

The exempted document was prepared by Council's legal representative with the exception of Schedule 1. Council considers that a document is exempt if it contains communications made for the dominant purpose of obtaining legal advice or the provision of legal services (including representation in legal proceedings), or for the dominant purpose of use in actual or anticipated legal proceedings.

In this regard, the document contains confidential communications between the Council and Council's professional legal advisers that were made for the dominant purpose of obtaining or proving legal advice. Further, as this is an ongoing matter, there is a potential that legal proceedings may arise as a result of Council's consideration in this matter.

Section 30 – Internal Working Documents

The full disclosure of opinions and recommendations contained in the document, in particular Schedule 1, would be contrary to the public interest as it is a method for conveying information between Council Officers and they must be able to freely communicate their professional opinions and rationale so as to ensure that decisions made regarding the directions of recommendations are subject to proper and thorough deliberation.

The release of the denied information would be counter-productive in facilitating internal communications. In particular:

- The document was prepared for internal use and consideration – if intended for public release they would have contained far more material for context and clarity;
- It is important to preserve the ability of officers expressing their views to be frank and candid particularly when giving information.

Importantly, given the nature of the matter that the document relates to, it would be contrary to the public interest to disclose the document reflecting possibilities considered as this would give a spurious standing to such document or propose pointless and captious debate about what might have happened rather than what did.

12. By email received on 3 December 2019, the Agency stated the following in relation to the last page of the document:

- The Schedule 1 attached was prepared by Council's officers.
- The attachment in Schedule 1 is not a confidential document prepared for the dominant purpose of a lawyer providing your Agency with legal advice. [sic] It is a document that was prepared for the purposes of internal discussion in relation to the draft Terms Sheet document to which it was attached to.
- Council does not seek to rely on the exemption under section 32(1) with respect to the attachment in Schedule 1, rather it seeks to rely on section 30(1) (internal working documents) for the reasons detailed in my letter to OVIC dated 15 October 2019.

Review of exemptions

13. The Agency relied on the exemptions under sections 30(1), 32(1) and 34(4)(a) to refuse access to the document. The Agency's decision letter sets out the reasons for its decision.

Section 32(1) – Documents affecting legal proceedings

14. Section 32(1) provides a document is an exempt document if it is of such a nature that it would be privileged from production in legal proceedings on the ground of legal professional privilege or client legal privilege.

15. A document will be subject to legal professional privilege and exempt under section 32(1) where it contains a confidential communication:¹

- (a) between the client (or the client's agent) and the client's professional legal advisers, that was made for the dominant purpose of obtaining or providing legal advice or is referable to pending or contemplated litigation; or
- (a) between the client's professional legal advisers and third parties, that was made for the dominant purpose of pending or contemplated litigation; or
- (b) between the client (or the client's agent) and third parties that was made for the purpose of obtaining information to be submitted to the client's professional legal advisers for the dominant purpose of obtaining advice on pending or contemplated litigation.

¹ *Graze v Commissioner of State Revenue* [2013] VCAT 869 at [29]; *Elder v Worksafe Victoria* [2011] VCAT 1029 at [22]. See also *Evidence Act 2008* (Vic), section 119.

16. A document will be subject to client legal privilege where it contains a 'confidential communication'² between:
- (a) the client (or the client's agent) and the client's professional legal advisers, that was made for the dominant purpose of obtaining or providing legal advice;³ or
 - (b) the client and another person, which was made for the dominant purpose of the client being provided with professional legal services relating to a proceeding in which the client is or was a party.⁴

Does the document contain a confidential communication?

17. The Agency exempted the first eight pages of the document under section 32(1) on grounds it discloses a confidential communication to its external legal representative made for the dominant purpose of obtaining or providing legal advice.
18. Having reviewed the document, I am satisfied the document is a confidential communication between the Agency and its legal representative.

What was the dominant purpose of the confidential communication?

19. The dominant purpose for which the confidential communication was made determines whether the exemption applies.⁵
20. Having reviewed the document and considered the Agency's submission, it is evident from the face of the document release of the first eight pages would disclose information provided by the legal representative to the Agency for the dominant purpose of providing legal advice.
21. Accordingly, I am satisfied the first eight pages of the document are exempt under section 32(1).

Section 30(1) – Internal working documents

22. As I am satisfied the first eight pages of the document are exempt under section 32(1), I have only considered the exemption under section 30(1) in relation to the one page schedule.
23. Section 30(1) has three requirements:
- (a) the document must disclose matter in the nature of opinion, advice or recommendation prepared by an officer or Minister, or consultation or deliberation that has taken place between officers, Ministers or an officer and a Minister; and
 - (a) such matter must be made in the course of, or for the purpose of, the deliberative processes involved in the functions of an agency or Minister or of the government; and
 - (b) disclosure of the matter would be contrary to the public interest.
24. The exemption does not apply to purely factual material in a document.⁶

² Defined in section 117 of the *Evidence Act 2008* (Vic) to mean communications made in circumstances where the Agency and its professional legal advisers were under an obligation not to disclose their contents.

³ Section 118 of the *Evidence Act 2008* (Vic).

⁴ Section 119 of the *Evidence Act 2008* (Vic).

⁵ *Thwaites v DHS* [1998] VCAT 580 at [22]-[24].

⁶ Section 30(3).

25. The term 'officer of an Agency' is defined in section 5(1). It includes a member of the agency, a member of the agency's staff, and any person employed by or for the agency, whether that person is one to whom the provisions of the *Public Administration Act 2004* (Vic) apply or not.
26. I must also be satisfied disclosure of the document is not contrary to the public interest. This requires a 'process of the weighing against each other conflicting merits and demerits'.⁷

Does the document disclose matter in the nature of opinion, advice or recommendation prepared by an officer or Minister, or consultation or deliberation that has taken place between officers, Ministers or an officer and a Minister?

27. The words 'opinion, advice or recommendation' convey a meaning of matters in the nature of a 'personal view', 'an opinion recommended or offered' or a 'presentation worthy of acceptance'.⁸
28. It is not necessary for information in a document to be in the nature of opinion, advice or recommendation. Rather, its release must disclose information of that nature.
29. The following do not constitute matter in the nature of opinion, advice or recommendation:
 - (a) the recitation of present existing facts;⁹
 - (b) the recording of events such as a conversation with the applicant;¹⁰
 - (c) a statement of intention,¹¹ and
 - (d) an internal document by which one officer informed another of a sequence of events.¹²
30. The information on the last page of the document comprises a table listing community hours of use over a five year rental period. I am of the view this information is in the nature of a statement of intention rather than information in the nature of opinion, advice or recommendation provided by an Agency officer to the Agency or exchanged between Agency officers.
31. A document may fall within section 30(1) even if it does not contain matter in the nature of opinion, advice or recommendation if it discloses matter in the nature of consultation or deliberation.
32. The term 'deliberative processes' is broadly interpreted. In *Re Waterford and Department of Treasury* (No. 2), the Commonwealth Administrative Appeals Tribunal held:

... "deliberative process" [is] wide enough to include any of the processes of deliberation or consideration involved in the functions of an agency... In short, ... its thinking processes – the processes of reflection, for example, upon the wisdom and expediency of a proposal, a particular decision or a course of action.
33. However, having reviewed the schedule and considered the Agency's submission, I am not satisfied information in the schedule is in the nature of consultation or deliberation between Agency officers.

⁷ *Sinclair v Maryborough Mining Warden* [1975] HCA 17; (1975) 132 CLR 473 at 485, adopted in *Department of Premier and Cabinet v Hulls* [1999] VSCA 117 at [30].

⁸ *Halliday v Office of Fair Trading* (unreported, AAT of Vic, Coghlan PM, 20 July 1995).

⁹ *Pullen v Alpine Resorts Commission* (unreported, AAT of Vic, Macnamara DP, 23 August 1996).

¹⁰ *Re City Parking Pty Ltd* (1996) 10 VAR 170.

¹¹ *Ibid.*

¹² *Ibid.* See also *Porter v Police* (Vic) [2005] VCAT 962, where the VCAT stated at [23] that it took the AAT to be saying that 'advice' must be 'something better' than mere 'informing'.

34. While the application of section 30(1)(a) has been interpreted to apply broadly, I am not satisfied the first limb of the exemption under section 30(1) is met and the information in the schedule is exempt under section 30(1).
35. I am not persuaded by the Agency's submissions in relation to public interest considerations. The issue to which the document relates is one that has significantly engaged the local community and, therefore, raises public interest considerations. In summary having reviewed the information in the schedule, I consider the following factors weigh in favour of release of the schedule in the public interest:
- (a) I do not consider the contents is particularly sensitive.
 - (b) The Council's recent decision not to proceed with the [specified year] [suburb] Park Masterplan update and to continue to implement the [specified year] version of the Masterplan makes the content of the schedule largely superseded.¹³
 - (c) In the event the Agency is concerned the schedule was not intended for public release and requires 'more material for context and clarity', it is open to the Agency to provide further clarity and context when disclosing the schedule.
 - (d) I consider the local community engaged in this issue is capable of understanding information in the schedule that formed part of the proposal and the public interest is served when disclosure of government information informs the public and allows for public participation in government decision making.
 - (e) It is important to preserve the ability of officers expressing their views to be frank and candid particularly when giving information
 - (f) The *Local Government Act 1989* (Vic) (**LG Act**) provides Councils are 'to be accountable to their local communities in the performance of functions and the exercise of powers and the use of resources'.¹⁴ Further, an object of the LG Act, is 'to ensure transparency and accountability in Council decision making'. As such, I am of the view disclosure of this single page schedule is consistent with the object of the LG Act.
 - (g) While I accept there is a public interest in Agency officers being 'able to freely communicate their professional opinions and rationale so as to ensure that decisions made regarding the directions of recommendations are subject to proper and thorough deliberation' based on the content of the document and other public interest factors considered above, I am of the view disclosure of the schedule is unlikely to impair the ability of Agency officers to prepare documents with proposals or provide frank and candid advice to the Agency to inform its decision making function.
36. Accordingly, I am not satisfied disclosure would be contrary to the public interest and the schedule to the document is exempt under section 30(1).

Section 34(4)(a)

37. In light of my decision above, it is not necessary for me to consider the additional exemption under section 34(4)(a) relied on by the Agency.

¹³ See statement issued on [date] by the Mayor of Maribyrnong City Council, Councillor [named person] on the Agency's website <[https://www.maribyrnong.vic.gov.au/\[web address\]](https://www.maribyrnong.vic.gov.au/[web address])>.

¹⁴ Section 1(5), LG Act.

Deletion of exempt or irrelevant information

38. Section 25 requires an agency to grant access to an edited copy of a document when it is practicable for the agency or Minister to delete exempt or irrelevant information and the applicant agrees to receiving such a copy.
39. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'¹⁵ 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 25.¹⁶
40. I have considered the effect of deleting exempt information from the document. In my view, it is practicable to do so as it would not require substantial time and effort, and the edited document would retain meaning.

Conclusion

41. On the information before me, I am satisfied the first eight pages of the document are exempt under section 32(1), and access to these pages is refused in full. However, I am not satisfied the one page schedule is exempt under section 30(1).
42. As it is practicable to edit the document to delete exempt information in the first eight, I have determined to grant access to the schedule on page nine.

Review rights

43. 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.¹⁷
44. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹⁸
45. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹⁹
46. 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.
47. 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.²⁰

When this decision takes effect

48. My decision does not take effect until the relevant review period (stated above) expires. If a review application is made to VCAT, my decision will be subject to any VCAT determination.

¹⁵ *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].

¹⁶ *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].

¹⁷ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

¹⁸ Section 52(5).

¹⁹ Section 52(9).

²⁰ Sections 50(3F) and (3FA).