

## Notice of Decision and Reasons for Decision

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Applicant:	'EA3'
Agency:	Moonee Valley City Council
Decision date:	23 March 2022
Exemptions and provision considered:	Sections 30(1), 32(1), 25
Citation:	'EA3' and Moonee Valley City Council (Freedom of Information) [2022] VICmr 30 (23 March 2022)

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FREEDOM OF INFORMATION – council documents – local government – complaint – councillor – parking permit – disclosure contrary to public interest – legal advice – 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 documents requested by the Applicant under the FOI Act.

My decision on the Applicant's request differs from the Agency's decision.

I am satisfied information in the documents is exempt under sections 30(1) and 32(1).

However, I am not satisfied certain information deleted by the Agency under section 25 is irrelevant to the terms of the Applicant's request. I have decided to release additional information where I am satisfied it is relevant to the scope of the Applicant's request and is not exempt.

As I am satisfied it is practicable to provide the Applicant with an edited copy of the documents with irrelevant and exempt information deleted in accordance with section 25, access is granted 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  
23 March 2022

## Reasons for Decision

### Background to review

1. The Applicant made a request to the Agency seeking access to certain documents.
2. Following consultation with the Agency, the Applicant clarified the initial request and sought access to:
  1. I would like to access policy documents, guides, conditions of use or other documents that relate to the use of Permits allocated to Moonee Valley City Councillors for their use in vehicles whilst in their role as Councillor, this may include Conditions of Use or other documents that provide information or guidance to Moonee Valley City Councillors.
  2. I would like to access email correspondence (including attachments) between-
    - a. Moonee Valley City Councillors (ie Councillor to/from Councillor)
    - b. Moonee Valley City Councillors and Moonee Valley City Council staff (ie Councillor to/from Staff)
    - c. Moonee Valley City Councillors and members of the public (ie Councillor to/from Public)
    - d. that include one or more of the following words (or the plural)-
      - o 'Councillor Parking Permit';
      - o 'Community Organisation Permit';
      - o 'Community Service Organisation Parking Permit';
      - o 'CSO Parking Permit'
      - o 'Parking Permit';
      - o 'Parking Pass'.

The scope of this request is between 1 June 2021 and now.

The Councillors I refer to are those Councillors listed on the MVCC website here [website]

I require access to draft documents.

I do not require access to duplicate documents.

I require access to commercial information relating to third parties.

I do not require access to personal information relating to third parties.

I require access to unedited documents.

I am happy for council to provide an edited version of documents as per s25 of the FOI Act.

3. The Agency identified 15 documents falling within the terms of the Applicant's request and granted access to five documents in full and refused access to two documents in part and one document in full under sections 30(1) and 32(1). The Agency also released seven documents administratively outside the FOI Act. The Agency's decision letter sets out the reasons for its decision.

### Review application

4. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
5. The Applicant advised they seek review of Documents 3, 5 and 13 only.
6. I have examined a copy of the three documents subject to review.

7. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
8. I have considered all communications and submissions received from the parties.
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.
10. 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.
11. 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.

## **Review of exemptions**

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

12. The Agency exempted parts of Document 5 under section 30(1).
13. 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;
  - (b) 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
  - (c) disclosure of the matter would be contrary to the public interest.
14. The exemption does not apply to purely factual material in a document.<sup>2</sup>
15. The term 'officer of an Agency' is defined in section 5(1). It includes a member of the agency, an agency employee, and any person engaged by or on behalf of the agency, whether or not they are subject to the *Public Administration Act 2004* (Vic).

*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?*

16. For the requirements of section 30(1) to be met, a document must contain matter in the nature of opinion, advice or recommendation prepared by an agency officer, or consultation or deliberation between agency officers.

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

<sup>2</sup> Section 30(3).

17. It is not necessary for a document to be in the nature of opinion, advice or recommendation. Rather, the issue is whether release of the document would disclose matter of that nature.<sup>3</sup>
18. Section 30(3) provides purely factual information is not exempt under section 30(1).
19. I am satisfied Document 5 discloses matter in the nature of opinion, advice and deliberation prepared by Agency officers in response to a complaint made by the Applicant to the Agency.

*Was the document 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?*

20. The term 'deliberative process' is interpreted widely and includes any of the processes of deliberation or consideration involved in the functions of an agency, Minister or government.<sup>4</sup>
21. In *Re Waterford and Department of Treasury (No.2)*,<sup>5</sup> the former Victorian Administrative Appeals Tribunal held:

... "deliberative processes" [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.
22. The document was created for the purpose of the deliberative processes of the Agency relating to its management of the complaint made by the Applicant to the Agency.

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

23. In determining if disclosure of a document would be contrary to the public interest, I must consider all relevant facts and circumstances remaining mindful the object of the FOI Act is to facilitate and promote the disclosure of information.
24. In doing so, I have given weight to the following factors:<sup>6</sup>
  - (a) the right of every person to gain access to documents under the FOI Act;
  - (b) the degree of sensitivity of the issues discussed in the documents and the broader context giving rise to the creation of the documents;
  - (c) the stage of a decision or status of policy development or a process being undertaken at the time the communications were made;
  - (d) whether disclosure of the documents would be likely to inhibit communications between Agency officers essential for the agency to make an informed and well-considered decision or participate fully and properly in a process in accordance with the Agency's functions and other statutory obligations;
  - (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, which the Agency would not otherwise be able to explain upon disclosure of the documents;

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<sup>3</sup> *Mildenhall v Department of Education* (1998) 14 VAR 87.

<sup>4</sup> *Brog v Department of Premier and Cabinet* (1989) 3 VAR 201 at 208.

<sup>5</sup> [1984] AATA 67; (1984) 5 ALD 588; 1 AAR 1 at [58].

<sup>6</sup> *Hulls v Victorian Casino and Gambling Authority* (1998) 12 VAR 483.

- (f) the impact of disclosing documents in draft form, including disclosure not clearly or accurately representing a final position or decision reached by the Agency at the conclusion of a decision or process; and
  - (g) the public interest in the community being better informed about the way in which the Agency carries out its functions, including its deliberative, consultative and decision-making processes and whether the underlying issues require greater public scrutiny.
25. The information in Document 5, which the Agency exempted from release under section 30(1), is contained in emails generated by Agency officers following receipt of the Applicant's complaint. The Agency released a copy of the complaint to the Applicant, however, it exempted subsequent internal correspondence between Agency officers discussing how to most appropriately handle the complaint.
26. The Applicant submits disclosure of this information would not be contrary to the public interest for the following reasons:
- I would like to know how Council and the Mayor handled concerns raised by members of the public and myself about Councillors.
- I am not the only member of public that has raised these concerns, other members of public have raised concerns regarding the use of Councillor Parking Permits ... I would suggest this indicates there is interest from the general public, not just myself.
- Providing information through an FOI process has the ability to demonstrate how an agency handles a complaint regarding a councillor (or council), this serves the public interest of the community.
27. I accept there is a public interest in ensuring agency officers involved in responding to a complaint by members of the public are able to internally discuss, deliberate and record relevant issues and information in a thorough and considered manner. This includes being able to make a written record of their internal deliberations without concern the inner workings of an agency's internal processes will be released under the FOI Act.
28. I also consider there is a public interest in the disclosure of information about the way in which the Agency responds to complaints made by members of the public about Agency officers.
29. In the particular circumstances of this matter, while I agree there is a public interest in transparency as to how the Agency deals with complaints made about Agency officers, the information in Document 5 contains general discussion between Agency officers in relation to its complaint handling processes. It does not contain deliberation specifically about Councillors' usage of their parking permits. I consider most of the information exempted by the Agency would not provide the Applicant with useful information in relation to the Agency's decision making processes in response to the Applicant's complaint.
30. On balance, I am satisfied disclosure of the information exempted from release by the Agency would be contrary to the public interest and accordingly, I am satisfied certain information in the document is exempt under section 30(1).
31. The Schedule of Documents in **Annexure 1** sets out my decision on section 30(1).

***Section 32(1) – Documents affecting legal proceedings***

32. 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'.

33. A document will be subject to legal professional privilege and exempt under section 32(1) where it contains a confidential communication:<sup>7</sup>
- (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;
  - (b) between the client's professional legal advisers and third parties, that was made for the dominant purpose of pending or contemplated litigation; or
  - (c) 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.
34. A document will be subject to client legal privilege where it contains a 'confidential communication'<sup>8</sup> 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;<sup>9</sup> 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.<sup>10</sup>
35. The High Court of Australia has held legal privilege ensures a client can openly and candidly discuss legal matters with their legal representative and seek and obtain legal advice:
- The rationale of this head of privilege, according to traditional doctrine, is that it promotes the public interest because it assists and enhances the administration of justice by facilitating the representation of clients by legal advisers, the law being a complex and complicated discipline. This it does by keeping secret their communications, thereby inducing the client to retain the solicitor and seek his advice, and encouraging the client to make a full and frank disclosure of the relevant circumstances to the solicitor.<sup>11</sup>
36. Where a question of legal privilege arises, the Agency must satisfy me the dominant purpose for which the document was prepared was either for legal advice, or alternatively for anticipated litigation.<sup>12</sup> The dominant purpose test applies to both communications for the purpose of obtaining or providing legal advice.
37. The information the Agency exempted from release under section 32(1) is in Document 3. It is an email between an Agency officer and its legal adviser.
38. I accept this information constitutes confidential communications that were made for the dominant purpose of obtaining and providing legal advice.
39. Legal privilege exists to protect the confidentiality of communications between a lawyer and a client. Privilege will be lost where the client has acted in a way that is inconsistent with the maintenance of that confidentiality – for instance where the substance of the information has been disclosed with

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<sup>7</sup> *Graze v Commissioner of State Revenue* [2013] VCAT 869 at [29]; *Elder v Worksafe Victoria* [2011] VCAT 1029 at [22]. See also section 119 of the *Evidence Act 2008* (Vic).

<sup>8</sup> 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.

<sup>9</sup> Section 118 of the *Evidence Act 2008* (Vic).

<sup>10</sup> Section 119 of the *Evidence Act 2008* (Vic).

<sup>11</sup> *Grant v Downs* [1976] HCA 63; (1976) 135 CLR 674 at [19].

<sup>12</sup> *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49.

the client's express or implied consent.<sup>13</sup> There is no information before me to indicate legal professional privilege has been waived.

40. Accordingly, I am satisfied certain information in Document 3 is exempt from release under section 32(1).

41. The Schedule of Documents in **Annexure 1** sets out my decision on section 32(1).

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

#### *Irrelevant information in Document 13*

42. In its decision, the Agency determined certain information in Document 13 is irrelevant to the terms of the Applicant's request and refused access in full to the document on the basis deleting the irrelevant information in accordance with section 25 would render the document meaningless.

43. In summary, section 25 permits an agency to release an edited copy of a document with any exempt or irrelevant information deleted, if it is practicable to do so and the applicant is agreeable. Alternatively, if it is not practicable to provide an edited copy of the document, or the applicant is not agreeable to receiving an edited copy, the agency is permitted to refuse access to the document in full.

44. Document 13 is an email to a Councillor from a third party. The Agency submits:

Document 13 had been sent to a Councillor by a third party updating the Councillor on a number of matters – the matters raised had no relevance to councillor parking permits other than a passing comment within the email....

45. While I have considered the Agency's submission, I am not convinced the Applicant intends to exclude passing comments about councillor parking permits.

46. I consider the terms of the Applicant's FOI request are sufficiently broad to include parts of Document 13 as the terms of the request include email correspondence between councillors and members of the public that includes, but is not limited to, references to councillor parking permits, regardless of whether the reference to parking permits is a passing comment.

47. Accordingly, I am satisfied certain information in Document 13 that the Agency determined is irrelevant relates to councillor parking permits and falls within the scope of the Applicant's request.

#### *Deletion of exempt and irrelevant information*

48. 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.

49. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'<sup>14</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>15</sup>

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<sup>13</sup> Sections 122(2) and (3) of the *Evidence Act 2008* (Vic) (for client legal privilege) or *Mann v Carnell* (1999) 201 CLR 1 at [28] (for legal professional privilege).

<sup>14</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>15</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].

50. I have considered certain information the Agency deleted from the documents as irrelevant. I agree it falls outside the scope of the Applicant's request because it relates to matters that do not concern parking permits or people other than those specified in the request.
51. I have considered the effect of deleting irrelevant and exempt information from the documents. In my view, it is practicable for the Agency to delete the irrelevant and exempt information, because it would not require substantial time and effort, and the edited documents would retain meaning.
52. The Schedule of Documents in **Annexure 1** sets out my decision on section 25.

### **Conclusion**

53. On the information before me, I am satisfied information in the document is exempt under sections 30(1) and 32(1).
54. In relation to certain information the Agency determined is irrelevant information for the purposes of section 25, I am satisfied it is relevant to the terms of the Applicant's request.
55. As I am satisfied it is practicable to provide the Applicant with an edited copy of the documents with irrelevant and exempt information deleted in accordance with section 25, access is granted in part.
56. The Schedule of Documents in **Annexure 1** sets out my decision in relation to each document.

### **Review rights**

57. 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>16</sup>
58. 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>
59. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.<sup>18</sup>
60. 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.
61. 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>19</sup>

### ***When this decision takes effect***

62. My decision does not take effect until the Agency's 14 day review period expires.
63. If a review application is made to VCAT, my decision will be subject to any VCAT determination.

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<sup>16</sup> The Applicant in section 50(1)(b) and the Agency in section 50(3D).

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

<sup>18</sup> Section 52(9).

<sup>19</sup> Sections 50(3F) and 50(3FA).



Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
1.	[Date]	Email with an attachment	3	Release in full Section 25	Not subject to review	
2.	[Date]	Email thread	2	Released in full Section 25	Not subject to review	
3.	[Date]	Email thread	3	Release in part Sections 32(1), 25	Release in part Sections 32(1), 25 My decision is the same as the Agency's decision.	<p><b>Section 32(1):</b> The document contains confidential communications between the Agency and its external legal adviser that was made for the dominant purpose of obtaining and providing legal advice. Accordingly, I am satisfied information in the document is exempt under section 32(1).</p> <p><b>Section 25:</b> In their FOI request, the Applicant states they do not seek access to personal affairs information of third parties. I am satisfied the information deleted from the document in accordance with section 25 is the personal affairs information of third parties and is to remain deleted.</p>

Document No.	Date of Document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
						<p>The document also contains information about matters unrelated to councillor parking permits, which I am satisfied is information that falls outside of the terms of the Applicant's request. This information is to remain deleted in accordance with section 25.</p> <p>I am satisfied it is practicable to provide the Applicant with an edited copy of this document with exempt and irrelevant information deleted in accordance with section 25.</p>
4.	[Date]	Email	6	Released administratively	Not subject to review	
5.	[Date]	Email thread	5	Release in part Sections 30(1), 25	Release in part Sections 30(1), 25  My decision is the same as the Agency's decision.	<p><b>Section 30(1):</b> I am satisfied information in the document is exempt under section 30(1) for the reasons outlined in the Notice of Decision above.</p> <p><b>Section 25:</b> I am satisfied the information the Agency deleted from the documents is the personal affairs information of third parties, which</p>

Document No.	Date of Document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
						falls outside the terms of the Applicant's request.  I am satisfied it is practicable to provide the Applicant with an edited copy of this document with exempt and irrelevant information deleted in accordance with section 25.
6.	[Date]	Email thread	5	Release in full  Section 25	Not subject to review	
7.	[Date]	Email	4	Released administratively	Not subject to review	
8.	[Date]	Email	6	Released administratively	Not subject to review	
9.	[Date]	Email thread	11	Released in full  Section 25	Not subject to review	
10.	[Date]	Email	6	Released administratively	Not subject to review	

Document No.	Date of Document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
11.	[Date]	Email thread	2	Release in full Section 25	Not subject to review	
12.	[Date]	Email	3	Released administratively	Not subject to review	
13.	[Date]	Email	2	Refused in full Section 25	<p>Release in part Sections 25</p> <p>The body of the email is to remain deleted as it contains irrelevant information, except for the following information which is to be released:</p> <p>(a) the subject line and date;</p> <p>(b) the greeting (except for the name of the third party); and</p> <p>(c) the fifth paragraph of the email following on from the greeting</p>	<p>Section 25: The Agency deleted parts of the document it considered irrelevant to the terms of the Applicant's request. For the reasons provided in the Notice of Decision above, I am satisfied certain information in this document falls within the terms of the Applicant's request.</p> <p>I am also satisfied it is practicable to edit this document to delete irrelevant information, as the document would not be rendered meaningless.</p>

Document No.	Date of Document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
					(except for names of third parties).	
14.	[Date]	Councillor Expenses Policy	14	Released administratively	Not subject to review	
15.	Undated	Community Organisation permit – Terms and conditions	1	Released administratively	Not subject to review	