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Notice of Decision and Reasons for Decision

Applicant:	'CV3'
Agency:	City of Boroondara
Decision date:	31 March 2021
Exemptions considered:	Sections 34(1)(b) and 38 of the <i>Freedom of Information Act 1982</i> (Vic) in conjunction with section 125 of the <i>Local Government Act 2020</i> (Vic)
Citation:	'CV3' and <i>City of Boroondara (Freedom of Information)</i> [2021] VICmr 85 (31 March 2021)

FREEDOM OF INFORMATION – council documents – emails – invoices – valuations – monetary amounts – disclosure of personal affairs information of third parties unreasonable – secrecy provision – *Local Government Act 2020* (Vic)

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 differs from the Agency's decision in that I have determined the information to which the Agency refused access under section 33(1) is exempt under section 38 in conjunction with section 125 of the *Local Government Act 2020* (Vic).

However, I am not satisfied information in the documents is exempt under section 34(1)(b).

Where I am satisfied it is practicable to provide the Applicant with an edited copy of a document with exempt and irrelevant information deleted in accordance with section 25, I have granted access to that document 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

31 March 2021

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency seeking access to the following documents:
...documents dated/created between [date range], regarding valuations of [residential address]:
 - All documents referring to the valuation objection
 - All documents referring to the VCAT matter [VCAT reference]
 - Instructions sent by Council to its valuer contractor(s)
 - Invoices sent from the valuer contractor(s) to Council
 - Internal correspondence between Council officers
2. In its decision, the Agency identified 177 documents falling within the terms of the Applicant's request, and granted access to 111 documents in full and refused access to 16 documents in part. The Agency also released 50 documents outside the FOI Act.
3. The Agency relied on the exemptions in sections 33(1) and 34(1)(b) to refuse access to documents. Information it determined as irrelevant to the terms of the Applicant's request was removed in accordance with section 25.
4. The Agency's decision letter sets out the reasons for its decision.

Review

5. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
6. I have examined copies of the 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.

Changes to the Local Government Act

11. In undertaking a review under section 49F, I am required by section 49P to make a fresh or new decision. This means my review does not involve determining whether the Agency's original decision is correct, but rather I am required to ensure my fresh decision is the 'correct or preferable

decision'.¹ This involves ensuring my decision is correctly made under the FOI Act and any other relevant applicable law in force at the time of making my fresh decision.

12. On 24 October 2020, the *Local Government Act 2020* (Vic) (**LG Act**) commenced. The secrecy provision in section 125 of the LG Act replaced the secrecy provision in the former *Local Government Act 1989* (Vic).
13. Section 125 of the LG Act changes the way a council must process certain FOI requests as it prohibits the disclosure of 'confidential information', which includes personal affairs information in documents held by a council.
14. Therefore, it is appropriate for me to first consider whether the documents subject to review are exempt under section 38 of the FOI Act in conjunction with section 125 of the LG Act.

Review of exemptions

Section 38 – Secrecy provision

15. A document is exempt under section 38 if the following three requirements are met:
 - (a) there is an enactment in force;
 - (b) the enactment applies specifically to the kind of information in a document; and
 - (c) the enactment prohibits persons, referred to in the enactment, from disclosing that specific kind of information (either absolutely or subject to exceptions or qualifications).
16. For section 38 to apply to a document, an enactment must be formulated with such precision that it specifies the actual information sought to be withheld.

Is there an enactment in force?

17. Section 125 of the LG Act provides:

125 Confidential information

- (1) Unless subsection (2) or (3) applies, a person who is, or has been, a Councillor, a member of a delegated committee or a member of Council staff, must not intentionally or recklessly disclose information that the person knows, or should reasonably know, is confidential information.
Penalty: 120 penalty units.
- (2) Subsection (1) does not apply if the information that is disclosed is information that the Council has determined should be publicly available.
- (3) A person who is, or has been, a Councillor, a member of a delegated committee or a member of Council staff, may disclose information that the person knows, or should reasonably know, is confidential information in the following circumstances—
 - (a) for the purposes of any legal proceedings arising out of this Act;
 - (b) to a court or tribunal in the course of legal proceedings;
 - (c) pursuant to an order of a court or tribunal;
 - (d) in the course of an internal arbitration and for the purposes of the internal arbitration process;
 - (e) in the course of a Councillor Conduct Panel hearing and for the purposes of the hearing;

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

- (f) to a Municipal Monitor to the extent reasonably required by the Municipal Monitor;
- (g) to the Chief Municipal Inspector to the extent reasonably required by the Chief Municipal Inspector;

18. I am satisfied the LG Act is an enactment in force for the purpose of section 38.

Does the enactment apply specifically to the kind of information in the documents?

19. The term 'confidential information' is defined in section 3 of the LG Act, which relevantly provides:

3 Definitions

...

- (f) personal information, being information which if released would result in the unreasonable disclosure of information about any person or their personal affairs;
- (g) private commercial information, being information provided by a business, commercial or financial undertaking–
 - i. relates to trade secrets; or
 - ii. if released, would unreasonably expose the business, commercial or financial undertaking to disadvantage;

20. The definition of 'confidential information' in the LG Act, as set out above, overlaps with the exemptions under sections 33(1) and 34(1)(b) of the FOI Act.

Section 33(1) – Personal affairs information of third parties

21. Section 33(1) provides a document is an exempt document if its disclosure:

- (a) would 'involve' the disclosure of information relating to the personal affairs of a person other than the Applicant (**personal information**);² and
- (b) such disclosure would be 'unreasonable'.

22. Information relating to the 'personal affairs' of a person includes information that identifies any person, or discloses their address or location. It also includes any information from which such information may be reasonably determined.³

23. The Agency exempted from release certain information in Documents 80, 90, 92, 102, 174 and 175. These documents are email communications between the Agency and other government department officers. The exempted information includes names, direct emails and telephone numbers. I am satisfied this information constitutes 'personal information' for the purposes of section 3(f) of the LG Act.

Would release of the 'personal information' in the document be unreasonable?

24. In relation to section 33(1), the concept of 'unreasonable disclosure' involves determining whether the public interest in disclosure of an individual's 'personal affairs information' in an official document is outweighed by the interest in protecting the personal privacy of an individual in the circumstances.

² Sections 33(1) and (2).

³ Section 33(9).

25. The Victorian Court of Appeal has held there is 'no absolute bar to providing access to documents which relate to the personal affairs of others'.⁴ Further, the exemption under section 33(1) 'arises only in cases of unreasonable disclosure' and '[w]hat amounts to an unreasonable disclosure of someone's personal affairs will necessarily vary from case to case'.
26. In determining whether disclosure of the personal information would be unreasonable, the Agency consulted with relevant third parties to obtain their views on disclosure of their personal affairs information to the Applicant. I note some individuals objected to the disclosure of their personal affairs information. Copies of these responses were provided for my consideration.
27. Broadly, I accept there is nothing particularly sensitive about disclosing the identity of Victorian public sector staff where such information merely concerns or represents those individuals performing their ordinary professional duties as public servants.
28. However, having considered the information before me, I am satisfied it would be unreasonable to release certain information in the documents, for the following reasons:
 - (a) From my review of the documents, I am of the view the role of the relevant third parties is administrative, in that they were not directly involved in the provision of services or outcomes affecting the Applicant.
 - (b) I consider the Applicant is able to read and interpret the documents without the inclusion of specific Agency staff names and their direct contact information. Further, the personal affairs information does not add any material value to the documents.
 - (c) The Applicant has not provided me with any information on how disclosure of the personal affairs information withheld would serve the public interest. Rather, I consider the Applicant's interest in the documents would serve a private interest only.
 - (d) I am satisfied the personal affairs information in the documents is not available to the public or otherwise available to the Applicant.
29. Accordingly, I am satisfied it would be unreasonable to disclose the personal information of third parties, particularly where they do not wish to have their personal information disclosed. Therefore, I am satisfied personal information in the documents is 'confidential information' for the purposes of the LG Act.
30. As such, I am satisfied section 38 of the FOI Act applies to the personal information of third parties in the documents as I am satisfied:
 - (a) section 125 of the LG Act is an enactment in force;
 - (b) subsection 3(f) of the LG Act refers specifically to the personal information in the documents; and
 - (c) section 125 of the LG Act prohibits Agency officers, specifically councillors and council staff, from disclosing 'confidential information'.
31. Accordingly, I am satisfied the personal information in the documents, which the Agency determined is exempt under section 33(1), is exempt under section 38 in conjunction with section 125 of the LG Act.

⁴ *Victoria Police v Marke* [2008] VSCA 218 at [76].

32. As I am satisfied section 38 applies to the personal information in the documents, it is not necessary for me to also consider the application of section 33(1) to the same information.

Section 34(1)(b) – Information acquired by the Agency from a business undertaking

33. Section 34(1)(b) provides a document is exempt if its disclosure under the FOI Act would disclose information acquired by an agency from a business, commercial or financial undertaking and:
- (a) the information relates to other matters of a business, commercial or financial nature; and
 - (b) the disclosure of the information would be likely to expose the undertaking unreasonably to disadvantage.
34. The words ‘business, commercial or financial nature’ have their ordinary meaning.⁵
35. The information to which the Agency applied section 34(1)(b) is the total fee amount as well as the fee breakdown, for services rendered to the Agency by an external valuation company (the **business undertaking**).
36. I accept information in the invoices was provided to the Agency by a private business undertaking.
37. I also accept the information broadly relates to matters of a business and financial nature.

Would disclosure of the information be likely to expose the undertaking unreasonably to disadvantage?

38. I note the exemption in section 34(1)(b) contemplates an undertaking may be exposed to a certain level of disadvantage. The question is whether the exposure to disadvantage would be unreasonable.
39. In determining whether a document is exempt under section 34(1), section 34(2) provides:

In deciding whether disclosure of information would expose an undertaking unreasonably to disadvantage, for the purposes of paragraph (b) of subsection (1), an agency or Minister may take account of any of the following considerations—

- (a) whether the information is generally available to competitors of the undertaking;
- (a) whether the information would be exempt matter if it were generated by an agency or a Minister;
- (b) whether the information could be disclosed without causing substantial harm to the competitive position of the undertaking; and
- (c) whether there are any considerations in the public interest in favour of disclosure which outweigh considerations of competitive disadvantage to the undertaking, for instance, the public interest in evaluating aspects of government regulation of corporate practices or environmental controls—

and of any other consideration or considerations which in the opinion of the agency or Minister is or are relevant.

40. Having considered the information before me, I am satisfied the information exempted by the Agency under section 34(1)(b) can be disclosed without causing substantial harm to the business undertaking for the following reasons:

⁵ *Gibson v Latrobe CC* [2008] VCAT 1340 at [25].

- (a) While the billing information is commercial information, it would be based on the particular circumstances of the matter.
- (b) While I am unable to determine whether this information is available to competitors of the business undertaking, I consider this information is not sufficiently detailed such that its disclosure could not cause commercial or financial detriment to the business undertaking by their competitors.
- (c) There does not appear to be any proprietary information in the documents concerning the business undertaking.
- (d) Given the matters concern the use of public funds for the procurement of goods and services, private companies that transact with government should reasonably expect a greater degree of transparency and accountability than what they would generally experience if they were dealing with other private entities. Further, private companies must understand that the information they provide has the potential to be released under the FOI Act or by other means.⁶
- (e) Had this type of information been generated by the Agency, it would be unlikely to be exempt under the FOI Act.

41. Accordingly, I am satisfied that release of the financial information would not unreasonably expose the business undertaking to disadvantage. Therefore, I am not satisfied it is 'confidential information' under the LG Act as it does not meet the definition as per subparagraph (g)(ii) of section 3 – refer paragraph 19 above. As such, I am satisfied section 38 does not apply.

Section 34(1)(b) – Information acquired by the Agency from a business undertaking

42. Having considered the information exempted by the Agency in Documents 3, 157, 160 and 163 under section 34(1)(b), I am further satisfied of the following:
- (a) disclosure of documents would disclose information that was acquired from a business undertaking, being an external valuation company;
 - (b) the information relates to matters of a business and financial nature; and
 - (c) for the reasons set out above, I am satisfied that the exempted information could be disclosed without causing the business undertaking substantial commercial or financial harm.

43. Accordingly, I am satisfied the documents are not exempt under section 34(1)(b).

Section 25 – Deletion of exempt or irrelevant information

44. Section 25 requires an agency to grant access to an edited copy of a document when it is practicable to delete exempt or irrelevant information and the applicant agrees to receiving such a copy.
45. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'⁷ and the effectiveness of the deletions. Where

⁶ This was noted by Deputy President Galvin in *Thwaites v Metropolitan Ambulance Services* (1996) 9 VAR 427 at [477].

⁷ *Mickelborough v Victoria Police (General)* [2009] VCAT 2786 [31]; *The Herald and Weekly Times Pty Limited v The Office of the Premier (General)* [2012] VCAT 967 at [82].

deletions would render a document meaningless, they are not 'practicable', and release of the document is not required under section 25.⁸

46. I have considered the information the Agency deleted from the documents as irrelevant. I agree it falls outside the scope of the Applicant's request as it relates to matters other than those specified in the Applicant's request.
47. I have considered the effect of providing the Applicant with an edited copy of the documents with irrelevant and exempt information deleted in accordance with section 25. I am satisfied it is practicable to delete the irrelevant and exempt information, as to do so would not require substantial time and effort, and the edited documents would retain meaning.

Conclusion

48. On the information before me, I am satisfied personal information in the documents is exempt under section 38 in conjunction with section 125 of the LG Act.
49. However, I am not satisfied information is exempt under section 34(1)(b).
50. Where I am satisfied it is practicable to provide the Applicant with an edited copy of a document with exempt and irrelevant information deleted in accordance with section 25, I have granted access to that document in part.
51. The Schedule of Documents in **Annexure 1** sets out my decision in relation to each document.

Review rights

52. 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.⁹
53. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹⁰
54. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹¹
55. 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.
56. 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.¹²

Third party review rights

57. I have decided to release documents that contain matters of a commercial nature relating to a third party business undertaking.
58. The relevant third party will be notified of my decision and is entitled to apply to VCAT for a review within 60 days from the date they are given notice.

⁸ *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].

⁹ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

¹⁰ Section 52(5).

¹¹ Section 52(9).

¹² Sections 50(3F) and (3FA).

When this decision takes effect

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

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	Number of Pages	Agency’s Decision	OVIC Decision	OVIC Comments
3.	[date]	Invoice	1	Released in part Section 34(1)(b)	Release in full	Sections 38 and 34(1)(b): For the reasons set out in the Notice of Decision, I am satisfied disclosure of the information would not unreasonably disadvantage the business undertaking. Accordingly, this information is not exempt under sections 38 or 34(1)(b).
66.	[date]	Email with attachment	3	Released in part Section 25	Release in part Section 25	Section 25: The Agency released this document with the attachment removed on grounds it is irrelevant to the Applicant’s request. Having considered the document and information provided by the Agency, I am satisfied it falls outside the scope of the Applicant’s request.
70.	[date]	Email with attachments	1	Released in part Section 25	Release in part Section 25	Section 25: See comments for Document 66.
71.	Undated	Billing List Attachment to Document 70	4	Released in part Section 25	Release in part Section 25	Section 25: Having examined the information removed by the Agency on grounds it is irrelevant to the Applicant’s request, I am satisfied it falls outside the scope of the Applicant’s request as it concerns other valuation assessments of the Agency.

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
80.	[date]	Emails	1	Released in part Section 33(1)	Release in part Section 38	Section 38: For the reasons set out in the Notice of Decision, I am satisfied it would be unreasonable to release the personal information exempted by the Agency. Accordingly, I am satisfied the information is confidential information and is exempt under section 38 in conjunction with section 125 of the LG Act.
81.	[date]	Attachment to Document 80	11	Released in part Section 25	Release in part Section 25	See comments for Document 71.
86.	[date]	Email attachment to Document 84	1	Released in part Section 25	Release in part Section 25	See comments for Document 71.
90.	[date]	Emails	2	Released in part Section 33(1)	Release in part Section 38	See comments for Document 80.
92.	[date]	Emails	1	Released in part Section 33(1)	Release in part Section 38	See comments for Document 80.
102.	[date]	Emails	1	Released in part Section 33(1)	Release in part Section 38	See comments for Document 80.
169.	[date]	Notes	6	Released in part Section 25	Release in part Section 25	See comments for Document 66.

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
157.	[date]	Invoice	1	Released in part Section 34(1)(b)	Release in full	See comments for Document 3.
160.	[date]	Invoice	1	Released in part Section 34(1)(b)	Release in full	See comments for Document 3.
163.	[date]	Invoice	1	Released in part Section 34(1)(b)	Release in full	The document appears to be a duplicate of Documents 157 and 160. See comments for Document 3.
174.	[date]	Emails	2	Release in part Section 33(1)	Release in part Section 38	See comments for Document 80.
175.	[date]	Emails	4	Released in part Section 33(1)	Release in part Section 38	See comments for Document 80.

