

Notice of Decision and Reasons for Decision

Applicant:	'EE4'
Agency:	Glen Eira City Council
Decision date:	15 June 2022
Exemptions considered:	Sections 33(1) and 38 in conjunction with section 125(1) of the <i>Local Government Act 2020</i> (Vic)
Citation:	'EE4' and <i>Department of Health</i> (Freedom of Information) [2022] VICmr 67 (30 May 2022)

FREEDOM OF INFORMATION – council documents – chief executive officer – calendar entries – fuel statements locations – location of third party – disclosure unreasonable

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 is the same as the Agency's decision.

I am satisfied certain information in the documents is exempt from release under sections 38 and 33(1).

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

15 June 2022

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency seeking access to documents concerning its Chief Executive Officer (CEO).
2. Following correspondence with the Agency, the terms of the request were confirmed as:
 - i. The CEO's Councils credit card statements from [date] to [date]. To be provided to you in the same format as your previous FOI request.
 - ii. The CEO's Council Diary from [date] to [date]. Being a copy of the outlook calendar used by the CEO. To be provided to you in the same form as your previous FOI request. Personal appointments can be removed. Personal affairs information is to be dealt with in the following manner:
 - a. you require access to personal affairs information in relation to individuals who, at the time of their meeting with the CEO as reflected in her Microsoft Outlook calendar, worked in the public sector; and
 - b. in relation to individuals who, at the time of their meeting with the CEO as reflected in her Microsoft Outlook calendar, did not work in the public sector – you are content for names to be removed from the documents, provided that the organisation the person was representing (if any) and the purpose for the meeting is retained, and provided you are advised of the number of names removed.
 - iii. The CEO's Fuel card statement from [date] to [date]. To be provided to you by way of extracts from Council's fuel card statements that relate to the CEO's vehicle.
 - iv. The CEO's Log book for the car between [date] to [date].
 - v. Council's current "Fleet Vehicles Policy" and "Fleet Vehicles Operation and Procedures Manual"; and the two previous versions (if any) of each of these documents.
3. The Agency consulted further with the Applicant about part (ii) of their request and it was clarified in the following terms:

The CEO's Council Diary from [date] to [date]. Being a copy of the outlook calendar used by the CEO. To be provided to you in the same form as your previous FOI request. Personal appointments can be removed. Personal affairs information is to be dealt with in the following manner:

 - a. you require access to personal affairs information in relation to individuals who, at the time of their meeting with the CEO as reflected in [their] Microsoft Outlook calendar, worked in the public sector;
 - b. in relation to individuals who, at the time of their meeting with the CEO as reflected in [the CEO's] Microsoft Outlook calendar, did not work in the public sector – you are content for names to be removed from the documents, provided that the organisation the person was representing (if any) and the purpose for the meeting is retained, and provided you are advised of the number of names removed; and
 - c. Council staff and/or Councillors details can be removed.
4. The Applicant also advised they do not seek the names of any individuals employed by [four named external employers].
5. The Agency identified 23 documents falling within the terms of the Applicant's request and released two policy documents outside the FOI Act, and refused access to the remainder of the documents in part under sections 33(1), and 38 of the FOI Act in conjunction with section 125(1) of the *Local Government Act 2020 (LG Act)*. The Agency's decision letter sets out the reasons for its decision.

Review application

6. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
7. I have examined copies of the documents subject to review.
8. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
9. I have considered all communications and submissions received from the parties.
10. 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.
11. 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 38 – Documents to which a secrecy provision applies

12. A document is exempt under section 38 if the following three requirements are met:
 - (a) there is an enactment (or law) in force;
 - (b) the enactment applies specifically to the kind of information in the requested 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).
13. 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?

14. Section 125 of the LG Act came into force on 24 October 2020 and 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;
- (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;
- (h) to a Commission of Inquiry to the extent reasonably required by the Commission of Inquiry;
- (i) to the extent reasonably required by a law enforcement agency.

15. Accordingly, I am satisfied the LG Act is an enactment in force for the purpose of section.

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

16. 'Confidential Information' in section 125(1) of the LG Act is defined in section 3(1) of that Act and includes:

- (f) personal information, being information which if released would result in the unreasonable disclosure of information about any person or their personal affairs;

17. The above definition overlaps with the personal affairs exemption under section 33(1) of the FOI Act, which provides a document is exempt if:

- (a) disclosure of a document under the FOI Act would 'involve' the disclosure of information relating to the 'personal affairs' of a person other than the Applicant (personal affairs information) (a **third party**);¹ and
- (b) disclosure of the personal affairs information would be 'unreasonable' in the circumstances.

18. Given this overlap, I have had regard to similar considerations that arise under section 33(1) of the FOI Act in determining whether the documents subject to review contain 'personal information' about a third party, and whether its disclosure would be unreasonable in the circumstances.

Do the documents contain 'personal information'?

19. I accept the term 'personal information' may encompass a broad range of information about an individual. For example, their name, address, their correspondence with a council or details about their property, family, employment or other personal details.

20. A majority of the information removed from the calendar entries by the Agency falls outside the terms of the Applicant's request – being the names of Council staff or persons not employed in the public sector.

21. The documents contain names and locations that constitutes the 'personal information' of third parties for the purposes of section 3(1)(f) and section 125(1) of the LG Act. Therefore, I have considered whether disclosure of this information would be unreasonable.

Would disclosure of the 'personal information' be unreasonable?

22. The concept of 'unreasonable disclosure' under section 33(1) involves balancing the public interest in the disclosure of official information with the interest in protecting the personal privacy of a third

¹ Sections 33(1) and 33(2).

party individual in the particular circumstances of a matter. This concept is applicable to my consideration as to whether information in a document constitutes 'confidential information' for the purposes of section 125(1) of the LG Act.

23. I adopt the view expressed by the Victorian Court of Appeal in *Victoria Police v Marke*,² that there is 'no absolute bar to providing access to documents which relate to the personal affairs of others'. 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'.³ The Court further held, '[t]he protection of privacy, which lies at the heart of [section] 33(1), is an important right that the FOI Act properly protects. However, an individual's privacy can be invaded by a lesser or greater degree'.⁴
24. In determining whether disclosure of the personal information would be unreasonable in the circumstances, I have considered the following factors:
- (a) The nature of the personal information.
 - (b) The circumstances in which the information was obtained.
 - (c) The Applicant's interest in the information. The FOI Act provides a general right of access that can be exercised by any person, regardless of their motive or purpose for seeking access to a document. However, the reasons why an applicant seeks access to a document is a relevant consideration in determining whether disclosure would be unreasonable under section 33(1).⁵
 - (d) Whether any public interest would be promoted by release of the personal information.
 - (e) The likelihood of disclosure of the personal information, if released. As the FOI Act does not place any restrictions on an applicant's use or dissemination of documents obtained under FOI, this is to be interpreted by reference to the capacity of any member of the public to identify a third party.⁶ Accordingly, I have considered the likelihood of the personal information in the documents being further disseminated, if disclosed, and the effects broader disclosure of this information would have on the privacy of the relevant third party.
 - (f) Whether the third party to whom the information relates object, or would be likely to object, to the release of the information.
 - (g) Whether disclosure of the information would or would be reasonably likely to endanger the life or physical safety of any person.⁷
25. The Agency submits the following information is exempt from release under section 38:
- (a) The names of some individuals in the CEO's calendar are administrative staff who have organised meetings between the CEO and other persons. These staff have advised that they do not want their details released. Given that you have advised that you are trying to understand who the CEO is meeting with, the names of administrative staff have no relevance to you. As such, I am of the view that the individual's interest in privacy outweighs the public interest in disclosing their information.
 - (b) There are entries in the CEO's calendar that relate to job applicants being interviewed. Given the nature of these appointments and the fact that job applicants may not always disclose when they

² [2008] VSCA 218 at [76].

³ Ibid.

⁴ Ibid at [79].

⁵ *Victoria Police v Marke* [2008] VSCA 218 at [104].

⁶ Ibid at [68].

⁷ Section 33(2A).

are looking for work, I have determined it would be unreasonable to provide you with the names of the individuals being interviewed.

- (c) I have removed a personal telephone number from the CEO's calendar. The number is not relevant to your request, and it is not publicly available. As such, I have determined that it would be unreasonable to release the information to you.
- (d) I have determined that all location data related to the CEO's use of [their] private vehicle contained in either the fuel card or credit card statements should not be disclosed to you. The locations show a pattern that may disclose the areas that the CEO attends regularly. I have determined that this is personal information to the CEO, and its disclosure would be unreasonable.

26. In their review application, the Applicant submits:

My reason for review is ...to obtain if the CEO breached State Government COVID lockdown and travelled interstate and repeatedly to their [description of] residence on the [location].

[Additional background information redacted]

The Council has repeatedly breached the Local Government Act in the hiring of new staff and not following the guidelines, so I ask that names are included so that dates of interviews and approaches can be verified.

[Additional background information redacted]

- 27. I note the Applicant's view regarding the names of job interviewees. However, this information falls outside the terms of their FOI request, being Council staff or individuals not engaged in the public sector. The terms of the Applicant's request cannot be broadened during the course of my review. Accordingly, this information remains out of scope of the request and this review.
- 28. Having reviewed the documents, I am satisfied the information the Agency deleted from the calendar entries falls outside the terms of the Applicant's request. What remains is the names of certain individuals identified by the Agency described in paragraph 25 above.
- 29. I have determined disclosure of the 'personal information' of third parties, as identified by the Agency in its decision, would be unreasonable for the following reasons:
 - (a) I agree the names of administrative staff who did not have any contact with or make decisions in relation to the Applicant would be unreasonable to release in the circumstances of this matter. I consider such disclosure would amount to an unnecessary intrusion into the privacy of those individuals where I can see no public interest in its disclosure.
 - (b) For those interviewees that remain within the scope of the request, I agree with the Agency that it would be unreasonable to release their names. I consider such information, while related to their professional roles, is sensitive and personal in nature. There is no information before me to demonstrate its disclosure would be in the public interest. In regards to the Applicant's concerns regarding the Agency's hiring practices, it is open to them to contact an independent oversight agency which have statutory powers to investigate such complaints and, if necessary, require the production of documents.
 - (c) I agree the provision of a private telephone number would be unreasonable and note the Applicant is not specifically seeking access to this information.
 - (d) In relation to the personal information of third parties, including the Chief Executive Officer, I consider its disclosure under the FOI Act would be unreasonable for the following reasons:
 - (i) Disclosure would enable the Applicant to determine, with precision, the location of the Chief Executive Officer on certain dates and times. Such information provides not only

access to their work-related movements but would also disclose information that may disclose their regular movements or locations, including their private residential address. As such, I consider this information amounts to sensitive personal information regardless of whether the Chief Executive Officer was driving a work or private vehicle.

- (ii) I consider disclosure of such detailed data in relation to an individual's movements and locations under the FOI Act would be unreasonable where it is not sought by a law enforcement or independent oversight agency in accordance with their statutory investigative powers.
- (iii) While the FOI Act provides any person with a general right of access to information in the possession of government or a public body, this right is limited by certain exceptions and exemptions including the protection of essential personal privacy rights.
- (iv) Given the nature of the information requested, it is most likely the relevant third parties would object to release of their personal information under the FOI Act.
- (v) While I note there is no indication the Applicant intends to provide the requested information to anyone other than the Ombudsman or Victoria Police, as indicated in their review application, the FOI Act does not place any restrictions on an applicant's use or dissemination of documents obtained under FOI.
- (vi) There is no information before me to support disclosure of the personal information would serve a public interest. Rather, I consider the interest in protecting the personal privacy of the third parties outweighs the Applicant's personal interest in obtaining access to the documents.
- (vii) Should the Applicant have concerns about the Agency, or an Agency employee, it is open to them to report their concerns to an appropriate agency, such as Victoria Police or an independent oversight agency, which are best equipped to investigate alleged criminal or misconduct matters.

Conclusion of the application of section 38

30. I am satisfied section 38 applies to the 'personal information' of third parties in the documents as:
- (a) section 125 of the LG Act is an enactment in force;
 - (b) the definition of 'confidential information' in section 3(1)(f) of the LG Act refers specifically to the personal information in the documents; and
 - (c) section 125(1) of the LG Act prohibits Agency officers, specifically councillors and council staff, from disclosing 'confidential information', including 'personal information', as defined in section 3(1)(f).
31. Accordingly, I am satisfied the personal information in the documents is exempt from release under section 38 in conjunction with section 125(1) of the LG Act.

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

32. A document is exempt under section 33(1) if two conditions are satisfied as detailed at paragraph 17.
33. For the reasons stated above in my assessment of section 38, I am satisfied the documents contain 'personal information' within the meaning of 'confidential information' in section 125(1) of the LG Act, which I consider is also 'personal affairs information' of third parties for the purposes of

section 33(1). Further, I am satisfied disclosure of this information would be unreasonable for the reasons discussed in paragraph 29.

34. Therefore, I am satisfied the information exempted from release by the Agency is also exempt under section 33(1).

Section 25 – Deletion of exempt or irrelevant information

35. 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.
36. Determining what is ‘practicable’ requires consideration of the effort and editing involved in making the deletions ‘from a resources point of view’⁸ 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 25.⁹
37. 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 was excluded during the course of clarifying the terms of the FOI request with the Applicant.
38. Given my decision is the same as the Agency’s decision and it granted access to the documents in part in accordance with section 25, I consider it remains practicable to provide the Applicant with an edited copy of the document with exempt information deleted.

Conclusion

39. On the information before me, I am satisfied certain information in the documents is exempt from release under sections 38 and 33(1).
40. 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.
41. The Schedule of Documents in **Annexure 1** sets out my decision in relation to each document.

Review rights

42. 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.¹⁰
43. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹¹
44. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹²
45. 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.

⁸ *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].

⁹ *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].

¹⁰ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

¹¹ Section 52(5).

¹² Section 52(9).

46. 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.¹³

¹³ Sections 50(3F) and 50(3FA).

Annexure 1 – Schedule of Documents

No.	Date of document	Title or description of document	No. of pages	Agency decision	OVIC decision	OVIC comments
1.1	[month year]	Statement - MasterCard [month year]	2	Released in full	Not subject to review	
1.2	[month year]	Statement – MasterCard [month year]	1	Released in full	Not subject to review	
1.3	[month year]	Statement – MasterCard [month year]	1	Released in full	Not subject to review	
1.4	[month year]	Statement - MasterCard [month year]	1	Released in full	Not subject to review	
1.5	[month year]	Statement – MasterCard [month year]	1	Released in full	Not subject to review	
1.6	[month year]	Statement – MasterCard [month year]	1	Released in full	Not subject to review	
1.7	[month year]	Statement - MasterCard [month year]	1	Released in full	Not subject to review	

No.	Date of document	Title or description of document	No. of pages	Agency decision	OVIC decision	OVIC comments
1.8	[month year]	Statement - MasterCard [month year]	1	Released in full	Not subject to review	
1.9	[month year]	Statement - MasterCard [month year]	1	Released in full	Not subject to review	
1.10	[month year]	Statement - MasterCard [month year]	1	Released in part	Not subject to review	
1.11	[month year]	Statement - MasterCard [month year]	1	Released in full	Not subject to review	
1.12	[month year]	Statement - MasterCard [month year]	1	Released in full	Not subject to review	
1.13	[month year]	Statement - MasterCard [month year]	1	Released in full	Not subject to review	
1.14	[month year]	Statement - MasterCard [month year]	1	Released in full	Not subject to review	

No.	Date of document	Title or description of document	No. of pages	Agency decision	OVIC decision	OVIC comments
1.15	[month year]	Statement - MasterCard [month year]	2	Release in full	Not subject to review	
1.16	[month year]	Statement - MasterCard [month year]	5	Released in full	Not subject to review	
2	[date] - [date]	CEO Outlook Calendar	71	Released in part Sections 33(1), 38	Release in part Sections 38, 33(1), 25 The document is to be released with irrelevant and exempt information identified by the Agency deleted in accordance with section 25.	<p>Section 38: I have determined the information deleted by the Agency under section 38 in conjunction with section 125(1) of the LG Act is exempt from release for the reasons set out above in the Notice of Decision.</p> <p>Section 33(1): I have determined the information deleted by the Agency under section 33(1) is exempt from release for the reasons set out above in the Notice of Decision.</p> <p>Section 25: The Applicant narrowed the terms of their request to remove certain names from the scope of the request. This information is therefore irrelevant to the request and is to remain deleted.</p>

No.	Date of document	Title or description of document	No. of pages	Agency decision	OVIC decision	OVIC comments
2.1	[date]	CEO Outlook calendar	1	Released in full	Not subject to review	
2.2	[date]	CEO Outlook calendar	1	Released in full	Not subject to review	
3.1	[date]to [date]	Fuel statements [date to date]	6	Released in part Sections 33(1), 38	Release in part Sections 38, 33(1), 25 The document is to be released with irrelevant and exempt information identified by the Agency deleted in accordance with section 25.	Section 38: See comments for Document 2. Section 33(1): See comments for Document 2. Section 25: See comments for Document 2.
3.2	[date]to [date]	Fuel statements [date to date]	3	Released in part Sections 33(1), 38	Release in part Sections 38, 33(1), 25 The document is to be released with irrelevant and exempt information identified by the Agency deleted in accordance with section 25.	Section 38: See comments for Document 2. Section 33(1): See comments for Document 2. Section 25: See comments for Document 2.