

Notice of Decision and Reasons for Decision

Applicant:	'EE7'
Agency:	City of Greater Geelong
Decision date:	14 June 2022
Exemptions and provisions considered:	Section 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:	'EE7' and <i>City of Greater Geelong</i> (Freedom of Information) [2022] VICmr 70 (14 June 2022)

FREEDOM OF INFORMATION – council documents – memorandum – internal [investigation] report – personal affairs information – confidential information – alleged [misconduct]– *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 a document requested by the Applicant under the FOI Act.

My decision on the Applicant's request differs from the Agency's decision in the exemption I have applied, however I have decided not to release further information to the Applicant.

I am satisfied the document is exempt from release under section 38 in conjunction with section 125 of the *Local Government Act 2020* (Vic) (**LG Act**).

As it is not practicable to provide the Applicant with an edited copy of the document with exempt information deleted in accordance with section 25, access to the document is refused in full.

The Schedule of Documents in **Annexure 1** sets out my decision in relation to the document.

My reasons for decision follow.

Sven Bluemmel
Information Commissioner

14 June 2022

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency seeking access to the following document:

[Specific request terms redacted – In summary, the Applicant sought access to any internal investigation report into a complaint about alleged misconduct of an Agency officer]
2. The Agency identified one document falling within the terms of the Applicant's request and decided to refuse access to the document in full. The Agency relied on the exemption under section 30(1) to refuse access to the document. The Agency's decision letter sets out the reasons for its decision.

Review application

3. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
4. I have examined a copy of the document subject to review.
5. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
6. I have considered all communications and submissions received from the parties.
7. 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.
8. 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.
9. 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'.¹ 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.

New Local Government Act and its focus on Council integrity

10. On 24 October 2020, the *Local Government Act 2020* (Vic) (**LG Act**) was enacted. The objectives of the LG Act are set out in section 4 and include ensuring, '[c]ouncils are constituted as representative bodies that are accountable, transparent, collaborative, efficient and engaged with their communities'.
11. Section 9 of the LG Act sets out overarching governance principles and supporting principles for that Act:
 - (1) A Council must in the performance of its role give effect to the overarching governance principles.
 - (2) The following are the overarching governance principles—
 - (a) Council decisions are to be made and actions taken in accordance with the relevant law;

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

- (b) priority is to be given to achieving the best outcomes for the municipal community, including future generations;
- (c) the economic, social and environmental sustainability of the municipal district, including mitigation and planning for climate change risks, is to be promoted;
- (d) the municipal community is to be engaged in strategic planning and strategic decision making;
- (e) innovation and continuous improvement is to be pursued;
- (f) collaboration with other Councils and Governments and statutory bodies is to be sought;
- (g) the ongoing financial viability of the Council is to be ensured;
- (h) regional, state and national plans and policies are to be taken into account in strategic planning and decision making;
- (i) the transparency of Council decisions, actions and information is to be ensured.

In giving effect to the overarching governance principles, a Council must take into account the following supporting principles—

- (a) the community engagement principles;
- (b) the public transparency principles;
- (c) the strategic planning principles;
- (d) the financial management principles;
- (e) the service performance principles.

12. However, principles regarding the object of transparency under the LG Act may be subject to the secrecy provision in section 125 of the LG Act, which 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;

...

13. The various provisions under Part 6 of the LG Act are directed at ensuring the integrity of local government, Councils, Councillors and Council employees in the discharge of their statutory functions and official duties and responsibilities.

Review of exemptions

Section 38 – Documents to which secrecy provisions of enactments apply

14. 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).
15. 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.
16. The Agency has not addressed this provision in its decision letter, however I have determined that it may apply in conjunction with section 125 of the LG Act, given the nature of the information contained in the document.

Is there an enactment in force?

17. I am satisfied section 125 of the LG Act is an enactment in force for the purpose of section 38, and the first requirement of section 38 is met.

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

18. 'Confidential Information' in section 125 of the LG Act is defined in section 3(1) of that Act to include:

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

...

19. The above definition in the LG Act of 'confidential information' overlaps with the 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);² and
 - (b) disclosure of the personal affairs information would be 'unreasonable' in the circumstances.
20. Given the overlap in definitions, in determining whether a document contains 'personal information' about any person or their personal affairs, and whether its disclosure would be unreasonable in the circumstances, I have had regard to similar considerations that arise under section 33(1).

² Sections 33(1) and (2).

21. I have also taken into consideration the definition of ‘personal affairs information’ in section 33(9) of the FOI Act, which provides that information relating to a person’s personal affairs 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

22. The Applicant submits:

...our client does not seek access to any information that would be exempt pursuant to s 33 of the Act (personal affairs information). In particular, our client does not require any names of specific individuals who have raised concerns regarding [name].

23. While I note the Applicant is not seeking certain personal information in the document, in my view the document contains additional information which I consider to constitute the ‘personal information’ of third parties, including Agency officers, for the purposes of section 3(1)(f) of the LG Act. This includes names, position titles, addresses, health information and personal information including that which relates to descriptions of events and the views expressed by third parties.

24. In relation to section 33(1), the concept of ‘unreasonable disclosure’ involves balancing the public interest in the disclosure of official information with the personal interest in privacy in the particular circumstances of a matter. I see this concept as similarly applicable to my consideration of whether certain information constitutes ‘confidential information’ for the purposes of the LG Act.

25. In *Victoria Police v Marke*,⁴ the Victorian Court of Appeal held there is ‘no absolute bar to providing access to document 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’.⁵ 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’.⁶

26. In determining whether disclosure of the document would be unreasonable, I have had regard to the following factors:

- (a) the nature of the personal affairs information and the circumstances under which it was obtained by the Agency

The memorandum subject to review was prepared following an internal investigation conducted by the Agency in relation to the conduct of a [role description] Agency officer.

While I consider, generally speaking, information regarding the conduct of Agency officers in the course of their professional duties would not be exempt, as it would not be unreasonable to release it, the circumstances of this matter are more sensitive. In my view, both sensitive personal and professional information are intertwined throughout the document.

I accept the identity of third parties is likely known to the Applicant, having considered the content of their submission and the background to the request. Nevertheless, even where a third party’s identity may be known to an applicant, disclosure may still be unreasonable in the circumstances.⁷

³ Section 33(9).

⁴ [2008] VSCA 218 at [76].

⁵ Ibid.

⁶ Ibid at [79].

⁷ *AB v Department of Education and Early Childhood Development* [2011] VCAT 1263 at [58]; *Akers v Victoria Police* [2003] VCAT 397.

- (b) the Applicant's interest in the information, including their purpose or motive in seeking access to the document

The Applicant is a [occupation, location]. They are seeking the information to inform their [understand about] the allegations made against the Agency officer, as well as the broader context relating to the allegations.

- (c) Whether any public interest would be promoted by disclosure

In order for conclusions to be made in relation to the enquiry, the [position title] was required to obtain information from third parties, including the subject of the investigation.

I do not consider those third parties would have been as engaged in the process of providing information related to their personal lives and experiences, had they known a document prepared in relation to the review would be disclosed under the FOI Act, or otherwise be available publicly.

In my view there is a public interest in maintaining the confidentiality of such investigations to ensure fulsome participation in any future investigations relating to employee conduct.

Taking into consideration all the circumstances therefore, I consider the public interest weighs against disclosure in this matter.

- (d) The likelihood of further disclosure if the information is released

The FOI Act does not place any restrictions on an applicant's use or further dissemination of a document obtained under FOI.⁸

In my view it is likely the information will be further disclosed, given the reasons for requesting the document provided by the Applicant described above.

While this factor is not determinative, I must also consider the effects that broader disclosure would be likely to have on the third parties concerned may be significant and detrimental.

- (e) Whether the individuals to whom the information relates object or would likely object to the disclosure of information

The Agency did not conduct consultation in relation to this matter.

On the information before me, and given the sensitive nature of the document, I consider the third parties would be likely to object to disclosure.

- (f) Whether disclosure would cause the individuals stress, anxiety or embarrassment

I consider it is likely disclosure of certain information in the document would cause certain third parties to whom the information relates stress and anxiety in the circumstances of this matter.

- (g) Whether the disclosure of information relating to the personal affairs of any person would, or would be likely to, endanger the physical life and safety of any person

There is no information before me to suggest this is a relevant factor in this matter.

27. Having weighed up the above factors, on balance, I am satisfied disclosure of the personal information in the document would be unreasonable in the circumstances for the purposes of section 125 of the LG Act.

⁸ *Victoria Police v Marke* [2008] VSCA 218 at [68].

28. As such, I am satisfied section 38 applies to this information as:
- (a) section 125 of the LG Act is an enactment in force;
 - (b) the definition of ‘confidential information’ subsection 3(f) of the LG Act refers specifically to the personal information in the document; and
 - (c) section 125 of the LG Act prohibits Agency officers, specifically councillors and council staff, from disclosing ‘confidential information’.
29. The Schedule of Documents in **Annexure 1** sets out my decision on the application of section 38 to the document.
30. As I have determined the document is exempt in full under section 38, I have not further considered whether section 30(1) applies to the document.

Section 25 – Deletion of exempt or irrelevant information

31. 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.
32. Determining what is ‘practicable’ requires consideration of the effort and editing involved in making the deletions ‘from a resources point of view’⁹ 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 25.¹⁰
33. I have carefully considered whether the document could be edited to remove exempt information. In my view the document as a whole is exempt under section 38 and it is therefore not practicable for the Agency to provide the Applicant with a copy of the document with exempt information deleted.

Conclusion

34. On the information available, I am satisfied the exemption in section 38 in conjunction with section 125 of the LG Act applies to the document.
35. As it is not practicable to provide the Applicant with an edited copy of the document with exempt information deleted in accordance with section 25, access is refused in full.

Review rights

36. If the Applicant is not satisfied with my decision, they are entitled to apply to the Victorian Civil and Administrative Tribunal (**VCAT**) for it to be reviewed.¹¹
37. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹²
38. 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.

⁹ *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].

¹⁰ *Honeywood v Department of Human Services* [2006] VCAT 2048 [26]; *RFJ v Victoria Police FOI Division (Review and Regulation)* [2013] VCAT 1267 at [140], [155].

¹¹ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

¹² Section 52(5).

39. 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 (3FA).

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
1.	[date]	Memorandum	4	<p>Refused in full</p> <p>Section 30(1)</p>	<p>Refuse in full</p> <p>Section 38</p>	<p>Section 38: I am satisfied the document is exempt from release under section 38 of the FOI Act in conjunction with section 125 of the LG Act, for the reasons outlined in the Notice of Decision above.</p> <p>Section 25: I am not satisfied it is practicable to provide the Applicant with an edited copy of this document with exempt information deleted in accordance with section 25.</p>