

Notice of Decision and Reasons for Decision

Applicant:	'EF8'
Agency:	Moorabool Shire Council
Decision date:	29 June 2022
Exemptions considered:	Section 38 in conjunction with section 125(1) of the <i>Local Government Act 2020</i> (Vic)
Citation:	'EF8' and Moorabool Shire Council (Freedom of Information) [2022] VICmr 81 (29 June 2022)

FREEDOM OF INFORMATION – council documents – information regarding neighbouring property – secrecy provision – ‘personal information’ – disclosure unreasonable – *Local Government Act 2020* (Vic) – review of agency fresh decision

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 fresh 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 that I am satisfied the document is exempt from release under section 38 in conjunction with section 125(1) of the *Local Government Act 2020* (Vic) (**LG Act**).

As I am satisfied 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 Document Schedule in **Annexure 1** sets out my decision in relation to the document.

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner

29 June 2022

Reasons for Decision

Background to review

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

A copy of the letter sent on behalf of Council's Lawyers, [name of legal firm], on or about [date], to the owners of [address] in relation to the use of the land as a [land use] without a permit. Letter sent likely to be a PDF titled 'Letter to [named individuals] dated [date] with encl...pdf'. [Named individual] was CC'd a copy of this letter on or about this date.
2. The Agency identified one document falling within the terms of the Applicant's request and refused access in full under section 38 in conjunction with section 125(1) of the LG Act. 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. During the review, the Agency submitted the document is also exempt under section 32(1) on grounds it was created for the dominant purpose of contemplated litigation and is subject to legal professional privilege, and section 33(1) on grounds it contains the personal affairs information of third parties.
5. Following receipt of the Agency's submission, the Agency was provided with a preliminary view that the document is not exempt under section 38 in conjunction with section 125(1) of the LG Act, with respect to the prohibition on disclosing legally privileged information. The Agency was afforded an opportunity to provide a further submission in response to the preliminary view or invited to make a fresh decision under section 49M(1).
6. Section 49M(1) permits an agency to make a fresh decision on an FOI request during a review.
7. On [date], the Agency made a fresh decision within the required 28 days under section 49M(2), in which it refused access to the document in full under sections 31(1)(a), 31(1)(d) and 33(1).
8. The Applicant did not agree with the Agency's fresh decision and, as required by section 49MA(2), I proceeded with my review on the basis of the fresh decision.
9. The Applicant advised they do not seek access to the personal affairs information of third parties in the document. Accordingly, such information is irrelevant information for the purposes of section 25, which is discussed below.
10. I have examined a copy of the document subject to review.
11. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
12. I have considered all communications and submissions received from the parties.
13. 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.

14. 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.

New Local Government Act

15. 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.
16. In its fresh decision, the Agency determined the document was exempt from release under section 33(1).
17. On 24 October 2020 the LG Act commenced. The secrecy provision in section 125(1) of the LG Act replaced the secrecy provision in the former *Local Government Act 1989* (Vic).
18. Section 125(1) of the LG Act changes the way a council must process certain FOI requests as it prohibits the disclosure of 'confidential information' including personal affairs information in documents held by a council.
19. Accordingly, it is appropriate for me to consider whether the document is exempt under section 38 of the FOI Act in conjunction with section 125(1) of the LG Act.

Review of section 38 – secrecy provision

20. 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).
21. 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 is an enactment in force?

22. 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—

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

- (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.

23. 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 document?

24. 'Confidential Information' in section 125(1) of the LG Act is defined in section 3(1) of that Act and includes 'personal information', which is 'information which if released would result in the unreasonable disclosure of information about any person or their personal affairs'.²
25. 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);³ and
 - (b) disclosure of the personal affairs information would be 'unreasonable' in the circumstances.

Does the document contain 'personal information' for the purposes of section 125(1) of the LG Act?

26. In determining whether the documents contain 'personal information' about any person or their personal affairs, and whether disclosure of the information would be unreasonable, I have had regard to similar considerations that arise under section 33(1).
27. A document is exempt under section 33(1) if its disclosure under the FOI Act would involve the unreasonable disclosure of information relating to the personal affairs of any person.
28. 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 this may be reasonably determined.⁴
29. A document will disclose a third party's personal affairs information if it is capable, either directly or indirectly, of identifying that person. As the nature of disclosure under the FOI Act is unrestricted and unconditional, this is to be interpreted by reference to the capacity of any member of the public to identify a third party.⁵

² Subsection 3(1)(f) of the LG Act.

³ Sections 33(1) and 33(2).

⁴ Section 33(9).

⁵ *O'Sullivan v Department of Health and Community Services (No 2)* [1995] 9 VAR 1 at [14]; *Beauchamp v Department of Education* [2006] VCAT 1653 at [42].

30. I note the Applicant has agreed to the removal of personal affairs information from the document. However, having considered the content of the document, which is a letter to a third party in relation to their property, I am satisfied the document in its entirety concerns the personal affairs information of the third party.
31. Therefore, while the Applicant does not seek access to information that explicitly identifies third parties, such as names, addresses and other contact details, I must also consider whether disclosure of the remaining information would be unreasonable in the circumstances.

Would release of the 'personal information' in the documents be unreasonable in the circumstances?

32. The concept of 'unreasonable disclosure' under section 33(1) involves balancing the public interest in the disclosure of official information with the personal interest in privacy in the particular circumstances of a matter.
33. In *Victoria Police v Marke*,⁶ the Victorian Court of Appeal held 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'.⁷ The Court further held, '[t]he protection of privacy, which lies at the heart of [section] 33, is an important right that the FOI Act properly protects. However, an individual's privacy can be invaded by a lesser or greater degree'.⁸
34. In determining whether disclosure of the personal affairs information would be unreasonable in the circumstances, I have considered the following factors:
- (a) the nature of the personal affairs information;
 - (b) the circumstances in which the information was obtained;
 - (c) the Applicant's interest in the information and whether their purpose for seeking the information is likely to be achieved;
 - (d) whether any public interest would be promoted by release of the personal affairs information;
 - (e) the likelihood of disclosure of information, if released;
 - (f) whether the individuals to whom the information relates object, or would be likely to object, to the release of the information; and
 - (g) whether disclosure of the information would or would be reasonably likely to endanger the life or physical safety of any person.⁹
35. The Agency submits disclosure would be unreasonable for the following reasons:
- (a) while the Applicant is aware of the name and address of the third parties, even where an applicant claims to know the identity of a third party, disclosure of a third party's personal affairs information in a document under the FOI Act may be unreasonable in the circumstances;¹⁰

⁶ [2008] VSCA 218 at [76].

⁷ Ibid.

⁸ Ibid at [79].

⁹ Section 33(2A).

¹⁰ *AB v Department of Education and Early Childhood Development* [2011] VCAT 1263 at [58]; *Edwards v Museum Victoria* [2011] VCAT 1421 at [40(b)].

- (b) the information was obtained by the Agency in carrying out enforcement activities under the *Planning and Environment Act 1987* (Vic) (**PE Act**);
- (c) certain personal affairs information in the document is sensitive and personal in nature;
- (d) it is alleged there is personal dispute between the Applicant and the third parties, which the Agency has considered as a material factor in the decision;
- (e) there is no broader public interest which would be promoted by disclosure of the personal affairs information of the third parties in this instance;
- (f) the Applicant's interest in the information would serve a personal interest only; and
- (g) third parties did not consent to disclosure of their personal affairs information in a previous matter.

36. The Applicant submits:

- (a) they do not have a personal dispute with the third parties and their concern is with the Agency's 'reluctance to enforce the planning scheme';
- (b) there is a public interest in disclosure as there are a number of residents who are directly affected by the third party allegedly breaching the planning scheme; and
- (c) there is a broader public interest in whether the Agency is effectively enforcing planning breaches and providing an effective service for ratepayers.

37. Having considered the documents and the circumstances of this matter I am satisfied it would be unreasonable to release the personal information of third parties in the document as:

- (a) the information relates to the Agency's enforcement activities under the [PE Act], and as such, the circumstances surrounding the matter is sensitive;
- (b) it is clear the information was obtained by the Agency with an expectation of confidence;
- (c) the information is not publicly available;
- (d) disclosure will serve a private interest rather than a broader public interest;
- (e) I am satisfied disclosure may impair the efficacy of the Agency's regulatory and enforcement functions in future, where the privacy of persons concerned is not protected; and
- (f) the person to whom the information relates would be reasonably likely to object to its release under the FOI Act.

38. Accordingly, I am satisfied section 38 applies to the personal information of third parties only the document as:

- (a) section 125 of the LG Act is an enactment in force;
- (b) subsection 3(1)(f) of the LG Act refers specifically to the 'personal information' in the documents for the purpose of 'confidential information' in section 125(1) of the LG Act; and
- (c) section 125(1) of the LG Act prohibits Agency officers, specifically councillors and council staff, from disclosing 'confidential information'.

39. My decision in relation to section 38 is set out in the Schedule of Documents in **Annexure 1**.

Section 25 – Deletion of exempt or irrelevant information

40. 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.

41. Determining what is ‘practicable’ requires consideration of the effort and editing involved in making the deletions ‘from a resources point of view’¹¹ 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 25.¹²

42. I have considered whether it is practicable to provide the Applicant with an edited copy of the documents with exempt information deleted in accordance with section 25. I am satisfied it is not practicable to do so as it would render the document meaningless.

Application of other exemptions

43. As I am satisfied the document is exempt in full under section 38 in conjunction with section 125(1) of the LG Act, it is not necessary to consider the application of sections 31(1)(a), 31(1)(d) or 33(1).

Conclusion

44. On the information before me, I am satisfied the document is exempt from release under section 38 in conjunction with section 125(1) of the LG Act.

45. As I am not satisfied it is 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

46. 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.¹³

47. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹⁴

48. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹⁵

49. 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.

50. 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.¹⁶

¹¹ *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].

¹² *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].

¹³ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

¹⁴ Section 52(5).

¹⁵ Section 52(9).

¹⁶ Sections 50(3F) and 50(3FA).

When this decision takes effect

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

Annexure 1 – Document Schedule

Document No.	Date of Document	Document Description	No. of Pages	Agency Decision	OVIC Decision	OVIC Comment
1.	[date]	Letter	9	<p>Refuse in full</p> <p>Sections 31(1)(a), 31(1)(d), 33(1)</p>	<p>Refuse in full</p> <p>Section 38</p>	<p>Section 38: The document contains confidential information for the purposes of the LG Act. As such, I am satisfied the document is exempt under section 38 in conjunction with section 125(1) of the LG Act.</p> <p>Section 25: I am not satisfied it is practicable to provide the Applicant with an edited copy of the document with exempt information deleted in accordance with section 25.</p>