

## Framework for releasing Council information proactively and informally under the *Local Government Act 2020 (Vic)* and *Freedom of Information Act 1982 (Vic)*

### Why do Council decisions, actions, and information need to be publicly available?

Under the *Local Government Act 2020 (LG Act)* your Council is required to adopt and maintain a public transparency policy.<sup>1</sup>

The LG Act requires your Council's public transparency policy to give effect to the public transparency principles.<sup>2</sup>

This means:

- your Council's decision making processes must be transparent, except when the Council is dealing with information that is confidential by virtue of the LG Act or any other Act;
- your Council's information must be publicly available unless:
  - the information is confidential by virtue of the LG Act or any other Act; or
  - public availability of the information would be contrary to the public interest;
- your Council's information must be clear, capable of being understood, and accessible to members of your community; and
- public awareness of the availability of your Council's information must be facilitated.

The public transparency principles establish that your Council's information must be publicly available, except in very specific and limited circumstances. These public transparency requirements are enhanced and complemented by the *Freedom of Information Act 1982 (Vic) (FOI Act)*.

The FOI Act supports your Council to release information proactively and informally outside of the FOI Act where it is possible and lawful to do so,<sup>3</sup> and to make the maximum amount of information available to the community promptly and inexpensively.<sup>4</sup>

Consequently, the LG Act and FOI Act both require and support your Council to publish information proactively and informally.

### When can I use the framework for releasing information proactively and informally?

The steps outlined in this framework detail how your Council can identify, assess, and publicly release Council information under both the LG Act and FOI Act.

It can be used:

- to support the development, review, and update of your Council's public transparency policy;
- alongside your Council's public transparency policy, to determine if information that has been requested can be informally (administratively) released to an individual or the community (See OVIC's Practice Note on [Informal Release](#) for more information); and

- to determine if information should be proactively released to the community irrespective of your Council’s public transparency policy or a request for certain information (See OVIC’s Practice Note on [Proactive Release](#) for more information).

## What are the steps in the framework?

- Step 1.** Council information should be identified, and by default made proactively available to the community, or informally released when requested, unless an exception in Step 2 applies.
- Step 2.** Consider if a specific or limited exception to release of the information applies.
- Step 3.** Consider if the information is ‘confidential information’ under section 125(1) of the LG Act.
- Step 4.** If the information is ‘confidential information’, consider whether your Council can or should make the information publicly available under section 125(2) or 125(3) of the LG Act.
- Step 5.** Consider if your Council should seek the views of any third party on release of the information.
- Step 6.** Consider whether release of the information would be contrary to the public interest.
- Step 7.** If there is information that cannot be made publicly available, consider whether that information can be removed, deleted, or redacted to facilitate the remainder of the information being released.
- Step 8.** Proactively or informally release the information, or otherwise make it available to be publicly accessed.

## What should I consider when applying each step of the framework?

### Step 1: Council information should be identified, and by default made proactively available to the community, or informally released when requested, unless an exception in Step 2 applies

Consider the following points:

- The availability of information and public transparency over all aspects of your Council’s operations and decision-making is the default position assumed by the LG Act. The LG Act states the transparency of your Council’s decisions, actions, and information is to be ensured.<sup>5</sup>
- Council information is broad and includes all documents and electronically stored information in the possession of your Council.<sup>6</sup>
- Council information should be current, accessible, and easy to find. If it is not openly published but is otherwise available, your Council should explain on its website or to the individual requesting the information, where and how the information can be accessed.<sup>7</sup>
- Proactively releasing your Council’s information does not need to be supported by reasons. Conversely, a reason must be identified to not release your Council’s information.
- When specific information is requested, it can be more efficient in terms of time and resources to informally release the information.
- Without limiting what information should be released, the LG Act and FOI Act promote the public release of the following types of Council information:<sup>8</sup>
  - information commonly requested by the community;
  - information that would promote community understanding and awareness of your Council’s

decisions, actions, and decision-making processes;

- information that would facilitate effective community engagement in the performance of your Council's many and varied responsibilities;
- information about the operation and performance of your Council;
- information on the expenditure of public monies by your Council;
- information on the rules and practices used by your Council that affect the community in their dealings with your Council;
- information on environmental or health risks to individuals or the community; and
- information and documents required to be published or listed as required by Part II of the FOI Act.

### **Step 2: Consider if a specific or limited exception to release of the information applies**

If a specific or limited exception applies, your Council is not required to release information.

This includes where:

- the information is 'confidential information' as defined under the LG Act (see Steps 3 and 4);<sup>9</sup>
- public availability of the information would be contrary to the public interest (see Step 7);
- the information has been requested under the FOI Act and is exempt from release. Note, the FOI Act permits exempt information to be released despite being exempt if your Council so chooses;<sup>10</sup>
- the information is 'personal information' or 'health information' and disclosure would breach the Information Privacy Principles<sup>11</sup> or Health Privacy Principles;<sup>12</sup> and
- the information is prohibited from release or subject to a secrecy provision under other legislation, for example, under the *Public Interest Disclosure Act 2012* (Vic).

### **Step 3: Consider if the information is 'confidential information' under section 125(1) of the LG Act**

Section 125(1) of the LG Act prohibits the intentional and reckless disclosure of confidential information. However, section 125(2) of the LG Act permits your Council to determine that confidential information should be made publicly available.

Any confidential information held by your Council should be reviewed regularly to determine if it can be made publicly available (see Step 4).

Note that section 125(1) of the LG Act does not apply to the disclosure of confidential information in response to a request under the FOI Act. See OVIC's Practice Note on the [FOI Act and section 125 of the LG Act](#) for further information.

Confidential information is defined under the LG Act as:

- (a) council business information, being information that would prejudice the Council's position in commercial negotiations if prematurely released;
- (b) security information, being information that if released is likely to endanger the security of Council property or the safety of any person;

- (c) land use planning information, being information that if prematurely released is likely to encourage speculation in land values;
- (d) law enforcement information, being information which if released would be reasonably likely to prejudice the investigation into an alleged breach of the law or the fair trial or hearing of any person;
- (e) privileged information, being information to which legal professional privilege or client legal privilege applies;
- (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 that relates to trade secrets; or if released, would unreasonably expose the business, commercial or financial undertaking to disadvantage;
- (h) confidential meeting information, being the records of meetings closed to the public under section 66(2)(a) [of the LG Act];
- (i) internal arbitration information, being information specified in section 145 [of the LG Act];
- (j) Councillor Conduct Panel confidential information, being information specified in section 169 [of the LG Act];
- (k) information prescribed by the regulations to be confidential information for the purposes of this definition; and
- (l) information that was confidential information for the purposes of section 77 of the *Local Government Act 1989* (Vic).

**Step 4: If the information is ‘confidential information’, consider whether your Council can or should make the information publicly available under section 125(2) or 125(3) of the LG Act**

Your Council should always consider whether confidential information is suitable to be made publicly available under section 125(2) of the LG Act. This can change over time and confidential information should be reviewed regularly.

Considerations when determining if confidential information can be publicly available may include:

- the benefit to the community if the information is released. For example, the information would promote community understanding and awareness of your Council’s decisions, actions, and decision-making processes, or any of the factors outlined in Step 1;
- the views of any third parties consulted about the release of the information (see Step 5);
- any temporal limits to the confidentiality. For example, if the confidentiality of the information is time limited, your Council can release the information as soon as practicable after that timeframe expires; or
- any reasons for maintaining confidentiality, making sure that no irrelevant considerations are considered (see Step 6).

Your Council should weigh the community benefits and objects of the LG Act against any legitimate reasons for maintaining confidentiality. If there is a greater benefit to the community, your Council should determine to make the confidential information publicly available.

Section 125(3) of the LG Act also lists a number of circumstances in which your Council is permitted to disclose 'confidential information'. This includes for legal proceedings, internal arbitration, Councillor Conduct Panel hearings, to the Municipal Monitor, Chief Municipal Inspector or a Commission of Inquiry, and to the extent reasonably required by a law enforcement agency.

#### **Step 5: Consider if your Council should seek the views of any third party on release of information**

If any information being considered for public release contains the information of third parties, your Council should consider consulting those third parties, regardless of whether the information is confidential information or not.

It may not always be practicable to undertake consultation, for example, if the third parties can no longer be contacted.

Consultation should generally be conducted with third parties in the following circumstances:

- with an individual, if release would disclose that individual's personal or health information;
- with an individual, if release would disclose information the individual provided in confidence;
- with a business, financial or commercial undertaking, if release would disclose business, commercial or financial information of that undertaking;
- with a relevant law enforcement body, agency, or authority if the information relates to law enforcement.

#### **Step 6: Consider whether release of the information would be contrary to the public interest**

Release of information should only be considered contrary to the public interest if your Council determines the harm likely to be created by releasing the information will exceed the public benefit in being transparent with your community. This is a high threshold to meet and must be supported by clear reasons.

General principles when considering the public interest and potential harm include:

- harm refers to harm to the community or members of the community;
- harm to your Council should only be considered if it is also a harm to the community;
- it is irrelevant for your Council to consider whether disclosure:
  - would cause embarrassment to or criticism of your Council;
  - would result in a possible misinterpretation by the community of an action, decision, or decision-making process of your Council.

Your Council should identify and weigh any public interest factors to determine whether the harm likely to be created by release will outweigh the public benefit of release. If the community benefit outweighs the risk of release, the information should be made publicly available.

Examples of public interest factors weighing in favour of release include:

- the factors outlined in Step 1 of this framework;
- the public interest in the community being better informed about your Council's deliberative, consultative, and decision-making processes; and

- the public interest in government transparency and accountability by enabling scrutiny or criticism of decisions and the decision-making process.

Examples of public interest factors weighing against release may include:

- harm to individuals or groups in the community, contrary to the *Charter of Human Rights and Responsibilities Act 2006* (Vic);
- harm to community health, safety, or security;
- harm to the fair treatment of individuals where it is about unsubstantiated allegations of misconduct or improper conduct;
- harm resulting from the disclosure of defamatory information or a breach of confidence in disclosing the information; and
- harm resulting from the disclosure of the information amounting to a criminal offence, or otherwise being contrary to law.

**Step 7: If there is information that cannot be made publicly available, consider whether that information can be removed, deleted, or redacted to facilitate the remainder of the information being released**

Often information that can't be made publicly available only forms a small part of the total information or document proposed for public release. For example, an individual's name or email address, or other confidential information in a Council policy or report could be redacted to make the remainder of the document or information available for release.

Where possible, your Council should remove, delete, or redact information that can't be publicly released and make the remainder of the information or document publicly available to ensure your Council is fulfilling its statutory obligations under the LG Act and FOI Act.

If your Council has received a request under the FOI Act for a particular document or information and you are considering informal release with redactions, you should ensure you speak to the applicant and obtain their consent or agreement.

If information is being redacted, an applicant may prefer a decision to be made under the FOI Act to retain their right to an independent review by OVIC. Where a request is made under the FOI Act, but your Council provides information informally, it is best practice to waive or refund the application fee.

**Step 8: Proactively or informally release the information, or otherwise make it available to be publicly accessed**

Prior to releasing information, consider:

- whether your Council's public transparency policy should be updated to reflect the availability of the Council information (for example, to update the policy to include any new policies, plans and reports in accordance with section 57(2)(c) of the LG Act);
- if any third parties that were consulted with in Step 5 should be notified of the release;
- how and where the information should be published, to ensure the information is understandable and accessible to the community;
- any resourcing implications of publication, and how these can be mitigated; and
- how the community will be made aware of the publication.

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<sup>1</sup> LG Act, section 57(1).

<sup>2</sup> LG Act, section 58.

<sup>3</sup> FOI Act, section 16(2).

<sup>4</sup> FOI Act, section 3.

<sup>5</sup> LG Act, section 9(2)(i).

<sup>6</sup> See the definition of 'document' in section 3 of the FOI Act.

<sup>7</sup> For example, Part II of the FOI Act requires Councils to publish, list, or otherwise make available a wide array of information and documents, including how to find and access that information.

<sup>8</sup> For example, see sections 9, 55, 56, 57 and 58 of the LG Act, and section 3 and 16 of the FOI Act.

<sup>9</sup> LG Act, section 3.

<sup>10</sup> FOI Act section 16.

<sup>11</sup> See Schedule 1 of the *Privacy and Data Protection Act 2014* (Vic).

<sup>12</sup> See Schedule 1 of the *Health Records Act 2001* (Vic).